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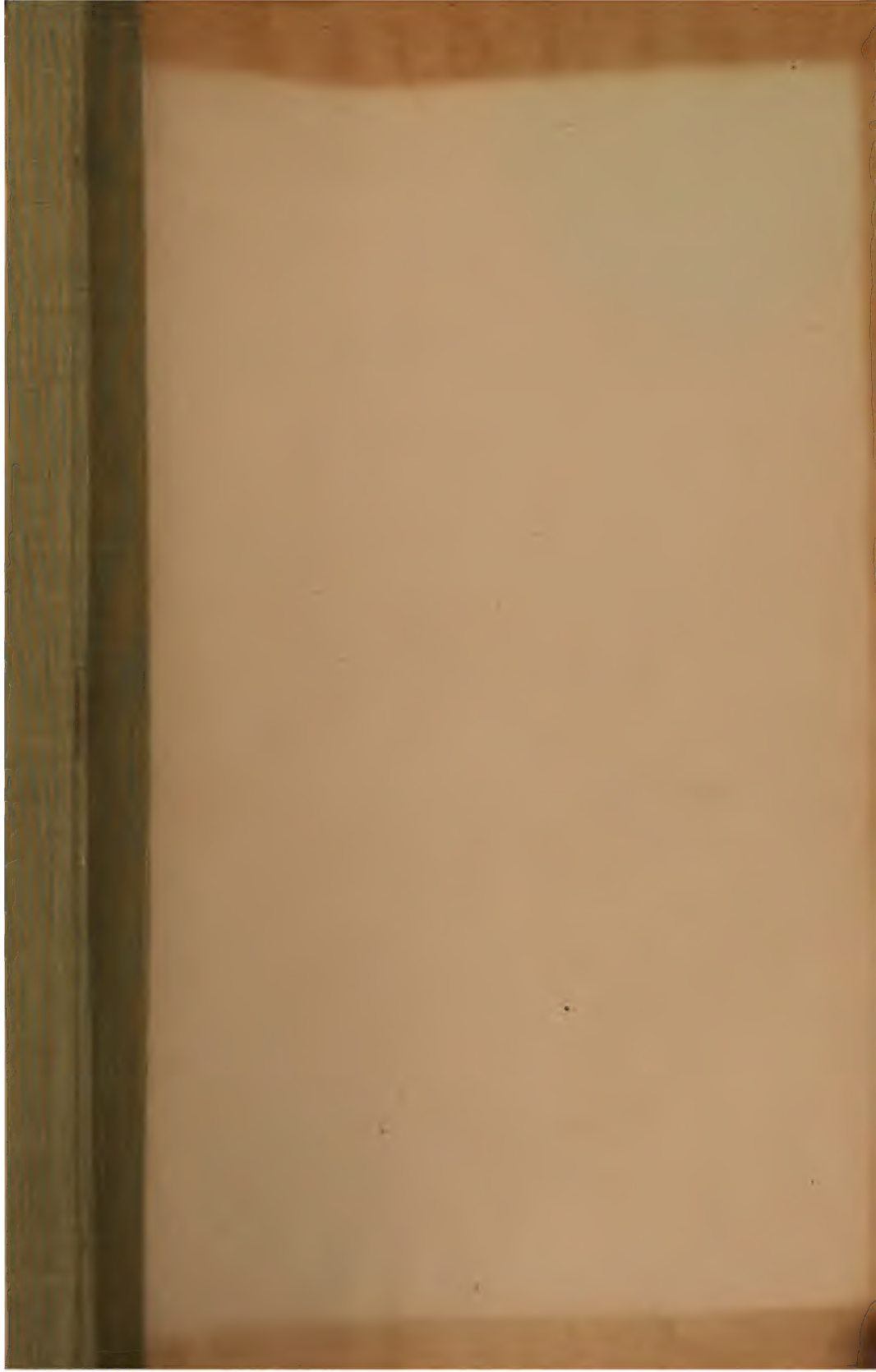
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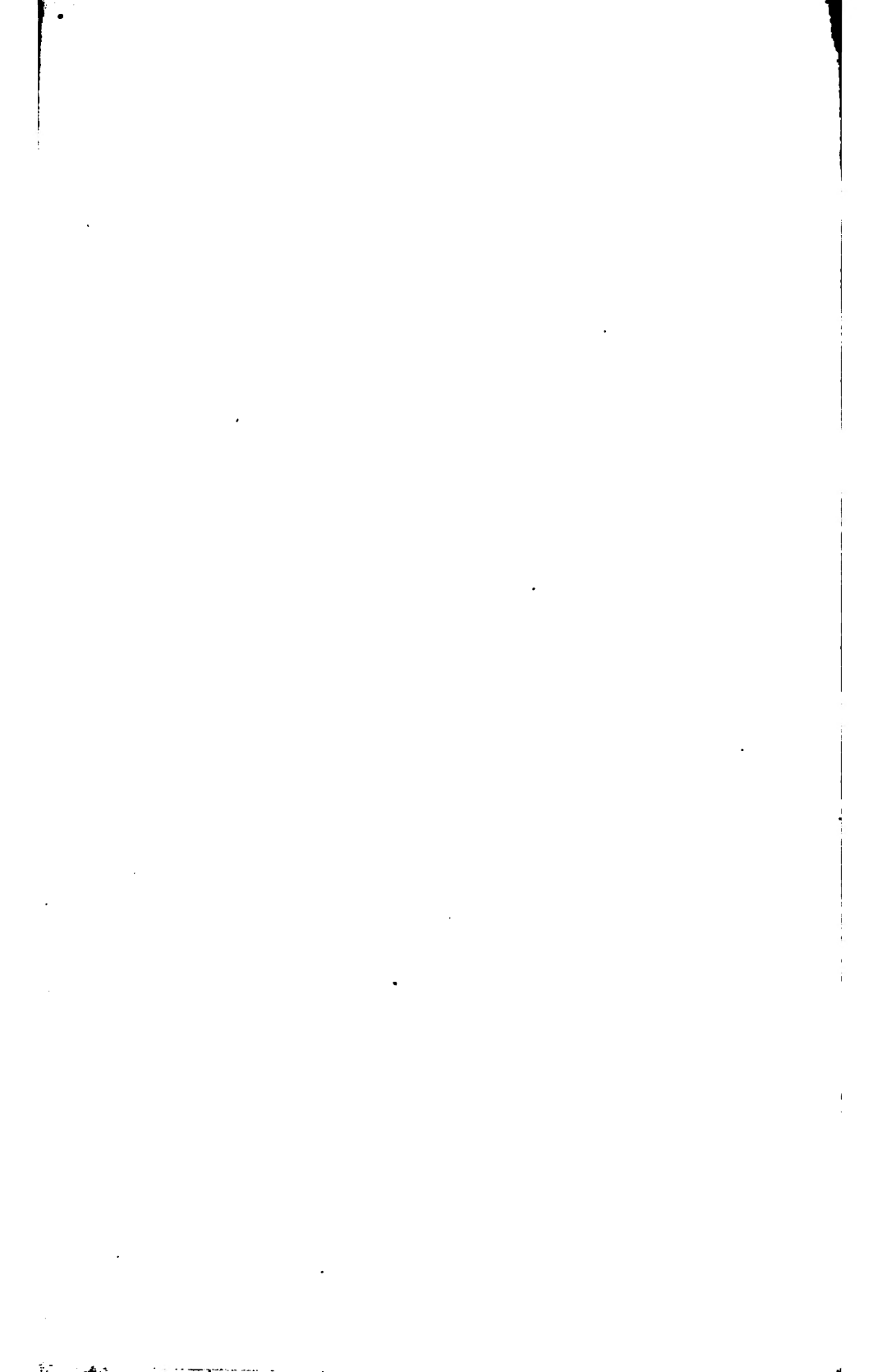
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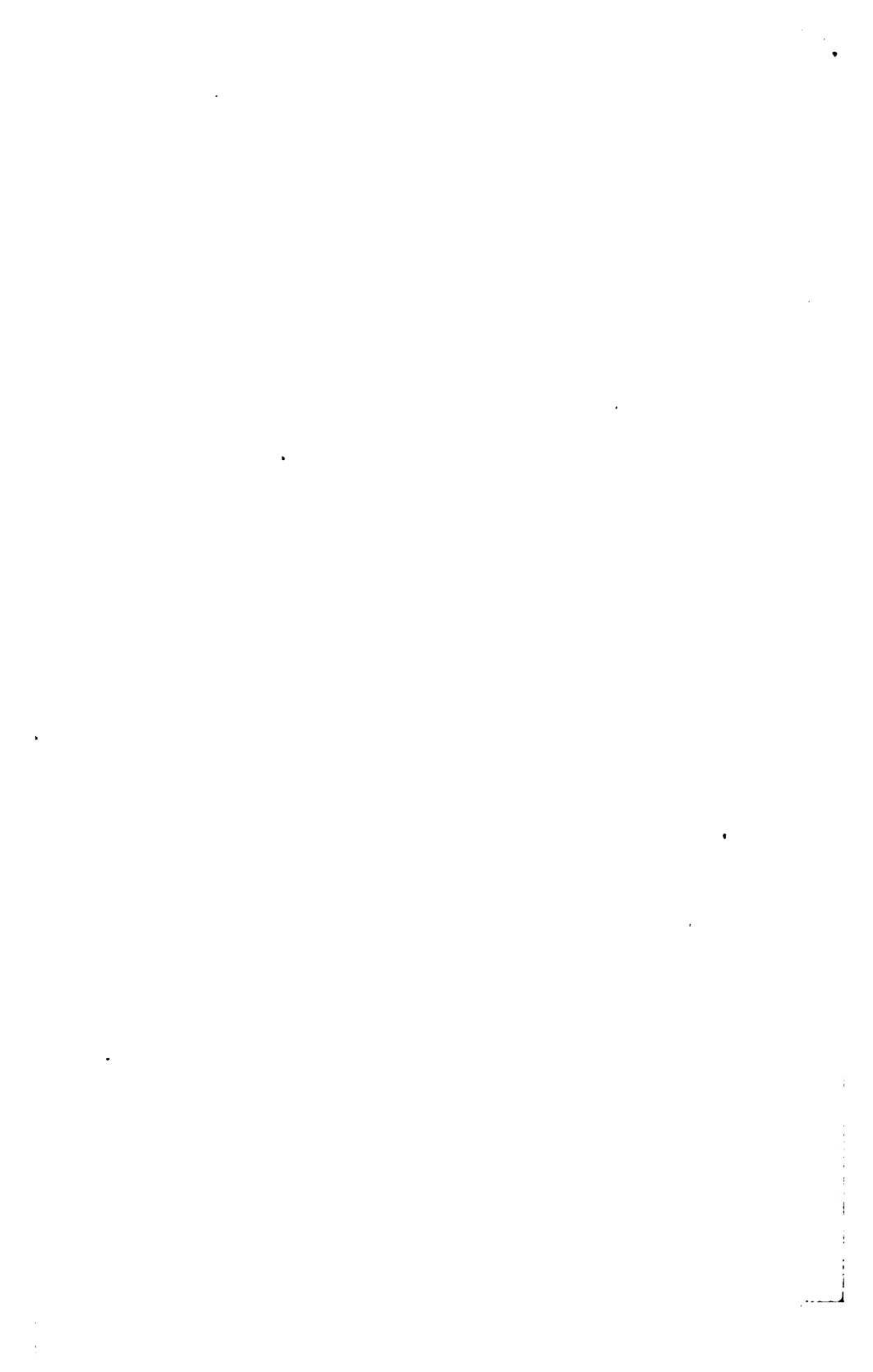
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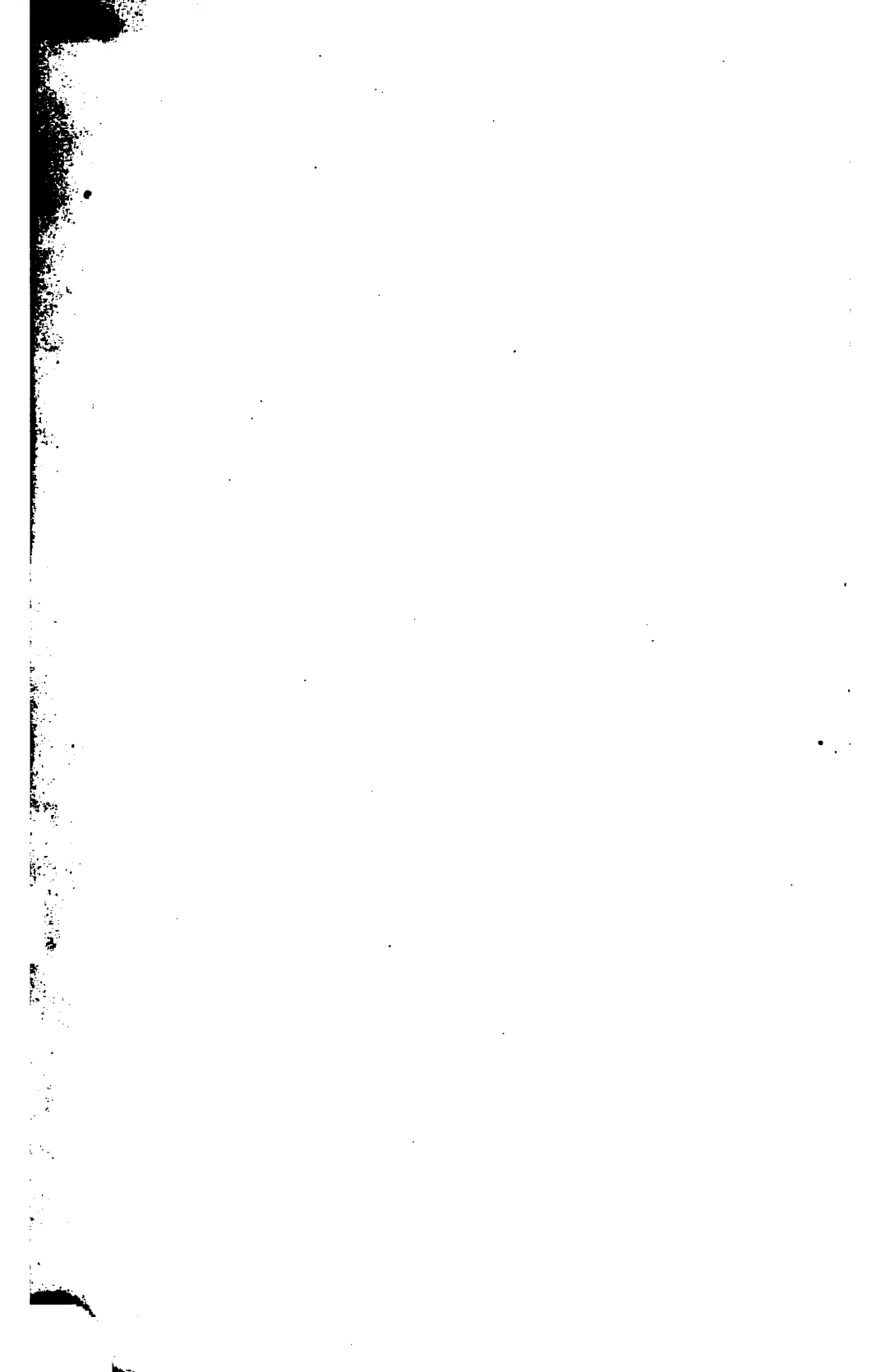
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1867.

REPORTED BY ALFRED HELM,

CLERK OF THE COURT.

VOLUME III.

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JUSTICES

OF

THE SUPREME COURT.

HON. H. O. BEATTY.....CHIEF JUSTICE.
 HON. J. F. LEWIS..... }
 HON. J. NEELY JOHNSON*.... }.....ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

ROBERT M. CLARKE.....ATTORNEY GENERAL.
 ALFRED HELM.....CLERK.

DISTRICT JUDGES OF THE STATE OF NEVADA.

FIRST DISTRICT.....HON. RICHARD RISING.
 SECOND DISTRICT.....HON. S. H. WRIGHT.
 THIRD DISTRICT.....HON. C. N. HARRIS.
 FOURTH DISTRICT.....HON. WM. HAYDON.
 FIFTH DISTRICT.....HON. G. G. BERRY.
 SIXTH DISTRICT.....HON. WM. H. BEATTY.
 SEVENTH DISTRICT.....HON. BENJ. CURLER.
 EIGHTH DISTRICT.....HON. S. H. CHASE.
 NINTH DISTRICT.....HON. CHAS. G. HUBBARD.

* Justice BROSNAN died April 21st, 1867, and Justice JOHNSON was appointed to fill the vacancy.

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R U L E S
OF
THE SUPREME COURT
OF
THE STATE OF NEVADA.

RULE I.

Applicants for license to practice as attorneys and counsellors will be examined in open Court on the first day of the term.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) twenty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored, the dismissal shall be final and a bar to any other appeal from the same order or judgment.

RULE IV.

On such motion, there shall be presented the certificate of the Clerk below, under the seal of the Court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of the filing the undertaking on appeal, and that the same is in due form, the fact and time of the settlement of the statement, if there be one ; and, also, that the appellant has received a duly certified transcript, or that he has not requested the Clerk to certify to a correct transcript of the record ; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this Court shall be on paper of uniform size, according to a sample to be furnished by the Clerk of the Court, with a blank margin one and a half inches wide at the top, bottom, and side of each page, and the pleadings, proceedings, and statement shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding, and of the testimony of each witness, and shall have, at least, one blank or fly-sheet cover.

Marginal notes of each separate paper, order, or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the Clerk of the Court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the Court below, either party may suggest the same, in writing, to this Court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the Court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the Court on the part of such representative or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes from the same Judicial District shall be placed together, and all the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that causes in which the people of the State are a party shall be placed at the head of the calendar.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the Clerk a copy of his own for each of the Justices of the Court, or may one day before the argument file the same with the Clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the Court; but each defendant who has appeared separately in the Court below, may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the Court, after having been finally corrected, shall be recorded by the Clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the Court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the Court below shall be issued until the expiration of the ten days herein provided, and decision upon the petition, unless upon good cause shown, and upon notice to the other party, or by written consent of the parties, filed with the Clerk.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the Court below.

RULE XVII.

No paper shall be taken from the court-room or Clerk's office, except by order of the Court, or of one of the Justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the Clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the Court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the Clerk of the Court below, and upon giving notice thereof to the opposite party or his attorney, and to the Sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this Court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree, which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. Where the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

PROCEEDINGS OF THE COURT

HAD UPON THE

DEATH OF JUSTICE BROSNAN.

MONDAY, May 13th, A.D. 1867.

Present—BEATTY, C. J. ; LEWIS, J.

On the opening of the Court, R. M. CLARKE, Esq., Attorney General of the State, arose and said :

May it please the Court :

It is my painful duty to announce that on the 21st day of April last, at San José, Santa Clara County, in the State of California, CORNELIUS M. BROSNAN, late Justice of this Court, departed this life. Judge Brosnan was born of Irish parents in County Kerry, Ireland, in the year 1813. Of his boyhood I know but little ; of his infancy nothing. At the age of fourteen, he entered Maynooth College, Ireland, where he remained a student for four years. Of his character and attainments, genius and promise as a student, it is sufficient to say that upon the walls of Maynooth College, in gilt frame, hangs the simple letter of a student to the Faculty. For more than a quarter of a century that letter has hung in its place, and been proudly pointed to by the Faculty as an evidence of the brilliant genius, scholarly attainments and character of its author. That letter was written by Cornelius M. Brosnan, then a boy of eighteen summers. Its preservation by such an institution as Maynooth College, through so many years, is in itself a noble tribute and splendid eulogy. In 1831—then eighteen years old—Judge Brosnan, outraged by the despotism that crushed Ireland, and

drawn by the greater advantages and broader liberties of America, emigrated to the United States, and immediately entered Plattsburg College, in the double capacity of teacher and student: teacher of the general sciences, and student of that particular science, nobler than all others—which he in common with us all so much loved and honored—the science of the law.

At the age of twenty-two he was admitted to the practice of that profession which he subsequently made the business of his life, and which by his wit, eloquence, judgment, learning and integrity, he honorably illustrated for thirty-two years. In 1851, drawn by the splendors of climate and fabulous wealth of California, and prompted by the spirit of progress and of hope, Judge Brosnan came to the Pacific coast and immediately entered upon the practice of his profession at San Francisco. His genial manners, his eloquence, learning and integrity, soon multiplied his friends, and won him an honorable position, second to none of his brothers in his profession. This position he proudly maintained through the subsequent years of his practice.

In 1863, attracted by the important litigation growing out of the unsettled title of the mines upon the Comstock Lode, and impressed with the certainty of the future permanent wealth and greatness of Nevada, Judge Brosnan crossed the Sierras and established himself at Virginia City. That he did not succeed in amassing a fortune or establishing an extensive and lucrative practice, reflects nothing to his discredit. He reached Virginia when the tide was receding. Reaction had punctured the balloon, and the inflation was rapidly subsiding. The legitimate ground of the profession was preoccupied. Besides, at that day the practice of the law had to some extent degenerated into the practice of villainy. Chicanery won more suits than eloquence and learning, and bribery and corruption more than solid merit. Judge Brosnan honored his profession, and scorned these practices. He would have perished a beggar in the street rather than dishonor his calling. A pettifogger shocked him; his high sense of honor revolted at a trick. No man in Nevada is more favorably or intimately identified with our political and judicial history than Cornelius M. Brosnan. In this respect he was a pioneer. He assisted in planning and completing our political edifice; he was a master mechanic, laid the founda-

tion and erected the superstructure. As a member of the Convention that framed the Constitution of Nevada, he rendered the people invaluable service, and won for himself an enviable distinction. As Chairman of the Judiciary Committee, he first originated and then enforced our present system of Judiciary. His learning and judgment were promptly recognized, and his opinions were to a great extent adopted by the Convention. His genius engrafted itself upon our fundamental law, which will forever stand a monument to his memory. He had much to do in shaping the politics of this State, and in preserving this people true to Republican institutions. He loved the country of his adoption second only to his honor, which he loved more dearly than life. He scorned a rebel beyond expression, and most of all, a rebel born. His voice was ever raised against oppression and wrong, and ever gave forth eloquent utterances for liberty and right. He was a Radical—that is to say, he was earnestly, entirely and unhesitatingly for the right—never willing to compromise principle for the sake of temporary, doubtful expediency.

In 1864, after Nevada, by the choice of her people and partiality of the General Government, had become a State in the Union, Judge Brosnan, by the unanimous and spontaneous voice of his party, was made a Justice of this Court—was called to illustrate the Judicial system he had conceived and enforced as a member of the Constitutional Convention. Nevada became a State to escape the deadfall of her Territorial Courts. Her temple of Justice had been transformed into a den of iniquity, from which the ermine seldom escapes untainted, and Justice never unscathed. An outraged public, writhing in the fury of its indignation, cried aloud for reform. An honest Court, composed of men as solid, as pure, and incorruptible as unalloyed and polished gold, was demanded. The public demand was satisfied in the selection of Cornelius M. Brosnan. To receive a nomination and election for Justice of the Supreme Court, at such a moment and under such circumstances, was indeed a splendid tribute to his judicial ability and purity. As a Justice of this Court, Judge Brosnan has more than satisfied public expectation. His career is above criticism. A man of strong prejudices and ardent friendships, the one nor the other have ever swerved him from the line of absolute and exact

justice. Upon the Bench he knew nothing but law, which he grasped with wonderful facility, comprehended almost with intuition, and enforced with the precision of demonstration. He wrote but few opinions, but these were models of precision, perspicuity and vigor, bearing the ring of pure law, and carrying conviction irresistibly with them. Written in the face of California precedent and an overwhelming public sentiment, *Milliken v. Sloat* will stand ever a monument of his firmness and integrity. Judge Brosnan was the "soul of wit" and honor. He had many ardent friends. All who knew him best, loved him most.

Out of respect to his memory and virtues, I move your Honors that this Court do now adjourn.

In response to the motion of the Attorney General, Chief Justice BEATTY said :

The death of our late associate, the Hon. C. M. BROSNAN, has filled the surviving members of the Court with sorrow and regret. Born and partially educated in Ireland, he removed, whilst yet a boy, to the State of New York. In that State he prosecuted the study of the law, obtained a license to practice, and at an early age distinguished himself by his eloquence, learning and success in his profession. In the year 1851 he came to the Pacific coast, and for a number of years practiced his profession in the city of San Francisco. At a later date he came to the Territory of Nevada, and participated in the deliberations of both the constitutional conventions which were assembled to frame a Constitution for the State of Nevada.

After the adoption of the State Constitution, which he had participated in forming, he was selected by the Union Party of the new State as one of its candidates for a seat on the Supreme Bench, to which office he was elected by a large majority of the voters of this State.

Born in a distant land, he heartily adopted this as his home and his country. In our fearful struggle for national existence, his voice was always raised for the country of his adoption. He never faltered in his allegiance ; never doubted the success of the national cause. With what eloquence he asserted the necessity of maintaining the national integrity and suppressing armed rebellion

against the just authority of his adopted country, all can attest. Possessed of a fine taste, a classical education, ardent in his feelings and naturally fluent, he made himself known to the public as an eloquent and gifted speaker. His learning and acquaintance with the principles of his profession were well known to the bar of the State. His firmness and decision, and the stoical resolution with which he resisted all the temptations which were attempted to be brought to bear on his judicial decisions, are best known to his associates. It is with no small degree of pleasure that I bear witness to his unswerving integrity, and that firmness of character which enabled him to pursue the straightforward course of an upright Judge, seeking only to ascertain the law and decide the right, regardless of personal consequences to himself. In his judicial course, he never stopped to inquire whether a decision might be popular or unpopular, whether it would result beneficially or injuriously to himself. But a few weeks since he left us for the more genial climate of our sister State, hoping to recover his accustomed health in the mild atmosphere of the coast region of California. For a time the change of climate seemed to be beneficial. But that change was either deceptive or of short duration. Too soon we heard the melancholy tidings of his death.

Out of respect for the memory of our deceased brother, this Court will stand adjourned until Monday next.

MONDAY, May 20th, A.D. 1867.

Present—BEATTY, C. J. ; LEWIS, J., and JOHNSON, J.

The Committee appointed to draft resolutions, by their chairman, R. M. Clarke, Esq., report the following :

Whereas, On the 21st day of April, A.D. 1867, inexorable fate removed from our midst, by death, the Honorable C. M. BROSNAN, late a Justice of the Supreme Court ; therefore, be it

Resolved, That the intelligence of his death was received by the officers and members of this Court with deep regret and profound sorrow.

Resolved, That by his decease this Court lost a learned and just Judge ; the State a capable and faithful officer ; the profession an ornament, and society an estimable member.

Resolved, That we extend our earnest sympathies to the relatives and friends of the deceased.

Resolved, That the court-room be draped in mourning, and that these resolutions be spread upon the minutes of the Court.

ROBERT M. CLARKE,
SAMUEL C. DENSON,
WM. PATTERSON.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
DURING THE YEAR 1867.

CHARLES L. SHERMAN, RESPONDENT, *v.* JAMES S.
DILLEY, APPELLANT.

To make a former judgment, between the same parties, evidence in a subsequent suit, it must appear that the facts constituting the estoppel were actually passed on by the jury in the former case.

If the pleadings do not show it, parol testimony may be introduced to explain the record, and show that the identical point arising in the second suit was tried in the former.

If no parol evidence be introduced, the record is only evidence of what is necessarily put in issue by the pleadings.

When a plaintiff in ejectment avers title and right of possession in himself, and the defendant denies both these allegations, and on the other hand avers title and right of possession in *himself*, here it would seem, *prima facie*, that the title was in controversy. The judgment, in such case, would operate as an estoppel in any future litigation between the same parties, unless it should be shown that one of the parties was prevented from making his title available in the former suit by some temporary impediment, such as an outstanding lease or license, or that he had acquired some new title since the former judgment.

Sherman v. Dilley.

The common law doctrine, that a judgment in ejectment cannot be pleaded in bar or given in evidence by way of estoppel, arises from the fact that this action at common law is between fictitious persons, and has no applicability to our action for possession of real property, which is more like the writ of entry or assize than the old action of ejectment. Our action, although called ejectment, seems to combine the properties of a writ of assize, of entry, and of right, and as such a judgment in an action is an estoppel in regard to all titles litigated therein.

It is proper for a Court to refuse instructions containing correct principles of law, if there is no evidence before the jury making them applicable to the case on trial.

A judgment cannot be pleaded in bar, or proved as an estoppel, whilst it is pending on appeal.

APPEAL from the District Court of the Third Judicial District, Lyon County, Hon. WM. HAYDON, presiding.

The facts are stated in the opinion.

F. H. & J. M. Kennedy and *R. M. Clarke*, for Appellant.

H. M. Steele, for Respondent, cited *Reynolds v. Harris*, 14 Cal. 678; *Gray and others v. Dougherty et al.*, 25 Cal. 266, and *Carpenter v. Schmidt*, 26 Cal. 479, as to the force and effect of the former judgment.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

By the former opinion of a majority of the Court in this case, the judgment of the lower Court was reversed, and a new trial ordered. Upon further examination of the authorities, however, I am satisfied that we were incorrect in our conclusions, and that the judgment of the lower Court must be affirmed.

The action was brought to obtain an injunction restraining the defendant from diverting a certain stream of water from premises claimed by the plaintiff; and also to recover the sum of one thousand dollars as damages for the diversion complained of. The rights of both parties apparently rest upon the ownership of the premises from which the water is diverted. Upon the trial, the plaintiff introduced in evidence the judgment roll in an action of ejectment brought by Dilley against Sherman to recover possession of the

Sherman v. Dilley.

premises from which it is claimed the water is diverted, and upon the ownership of which the right to the water seems to depend. The judgment in that action being in favor of Sherman, it was used by him on the trial of this cause as an estoppel to any claim of title which existed at the time of its rendition, and which the defendant Dilley might wish to set up in this action. Acting upon the conviction that that judgment constituted an estoppel, the Court below charged the jury that "the judgment read in evidence in this case by the plaintiff is a bar to any right which the defendant might or did have, or might have proven at the time of the trial on which said judgment was rendered; therefore you are instructed to disregard all testimony of title or right of possession to the premises in dispute which existed prior to that time." The giving of this instruction by the Court below brings up the question whether the verdict and judgment in the first action between these parties were admissible in evidence as an estoppel on the trial of the second.

The general rule of law is, that a judgment of a Court of competent jurisdiction directly upon a certain point, is as a plea a bar, or as evidence conclusive between the same parties or privies upon the same matter in any other action. In the *Duchess of Kingston's case*, (20 *Howell's State Trials*) Chief Justice De Gray lays down the rule upon this subject, as follows: "From the variety of cases relating to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First. That the judgment of a Court of concurrent jurisdiction directly upon the point, is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another Court. Secondly. That a judgment of a Court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties coming incidentally in question in another Court for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

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To make the former judgment between the same parties admissible in evidence in another action pending between them, it must appear that the fact constituting the estoppel, and which is sought to be proved by the record, was actually passed upon by the jury in finding their verdict in the former suit. It is, perhaps, not necessary that it should have been directly and specifically put in issue by the pleadings; but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence. But when the fact is not directly put in issue by the pleadings, and it was not a fact necessary to be passed upon before judgment could be rendered, then parol evidence is admissible to show that the same fact was submitted to, and passed upon by the jury in the former action. If this be not done, the judgment would, as evidence, be conclusive of nothing but the material facts directly put in issue by the pleadings, or such as it was necessary to pass upon in finding the verdict, or rendering the judgment. The judgment introduced in evidence in this case, was rendered upon pleadings in which each party avers that he is the owner, and entitled to the possession of the real estate in the controversy. Though the right of possession was the ultimate question to be determined by the Court in that case, that right seems only to have been claimed as resulting from the ownership of the premises. The plaintiff alleges that he is the owner and entitled to the possession of the premises, whilst the defendant denies such ownership, and claims ownership and right of possession in himself. If that be the state of the case, the right of possession could only be determined by passing upon the title, and if that was found to be in Sherman, it would be a violation of the rule above laid down to allow Dilley to set up the same claim in a subsequent action against Sherman, which he had relied on before, and which had been declared insufficient to entitle him to recover; unless he shows that the title, upon which he relies in the second action, was unavailable in the first by reason of some existing lease or license, which, at that time, defeated the right of possession. Such fact could undoubtedly be shown by parol proof, and in that way, the title which had been relied on in the first action, might become available in the

second ; for, notwithstanding the same title may be relied on in the second action which was employed in the first, the recovery in the second action may be sought upon a right of possession which has accrued upon that title since the first action. However, when the pleadings put the title or ownership in issue, *prima facie*, the verdict and judgment would constitute an estoppel to the assertion of any title which existed in the party at the time of the former action.

At common law, when the action of ejectment was based upon a fiction, and the parties were fictitious, the record could not be used by way of estoppel. The reason for that rule is clearly stated by Mr. Justice Miller, in the case of *Miles v. Calwell* (2 Wallace, 40). He says: "One reason why the verdict cannot be made conclusive in these cases, is obviously due to the fictitious character of the action. If a question is tried and determined between John Doe, plaintiff, and A B, who comes in and is substituted defendant in place of Richard Roe, the casual ejector, it is plain that A B cannot plead the verdict and judgment in bar of another suit brought by John Den against Richard Fen, though the demise may be laid from the same lessor ; for there is no privity between John Doe and John Den. Hence, technically, an estoppel could not be successfully pleaded so long as a new fictitious plaintiff could be used."

This reason, however, no longer exists. Under our practice the real parties in interest are made plaintiffs and defendants ; and, as is usual under the new forms, the real ownership or title is put in issue, there is, perhaps, no reason why a judgment upon such pleadings should not operate by way of estoppel. If the plaintiff pleads ownership or title in fee in himself, and issue is taken upon that question, and found against him, we can see no reason why the record should not operate as an estoppel to any title existing in the same party at the time of the first trial. Our action for the recovery of the possession of real property is more analogous to the proceeding by writ of entry, or assize, at common law, than to the old action of ejectment. Those were actions merely possessory, serving only to regain the possession. They determined nothing with respect to the right of property. Under the writ of entry the title of the tenant or possessor was disproved by showing the

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unlawful means by which he entered or continued in possession. The defendant was allowed to deny or justify his entry by showing title in himself, or those under whom he makes claim; whereupon, the possession of the land was awarded to him who produced the clearest right to possess it. "As a writ of entry," says Mr. Justice Blackstone, "is a real action which disproves the title of the tenant by showing the unlawful commencement of his possession, so an *assize* is a real action which proves the title of the demandant merely by showing his or his ancestor's possession; and these two remedies are, in all other respects, so totally alike, that a judgment or recovery in one is a bar against the other; so that when once a man's possession is established by either of these possessory actions, it can never be disturbed by the same antagonists in any other of them." (5 Chitty's Blackstone, 184.)

True, the unsuccessful party in either of these actions could again appeal to the Courts to have the *rights of property* established by means of the writ of right, whereby the right of property alone was determined. But where these various forms of real actions are recognized, a material distinction is maintained between the writ of entry and *assize*, whereby the right of possession alone is determined, and the writ of right which determines the right of property. It was held by the Courts that the subject matter of the action by writ of entry and *assize* was different from that involved in the writ of right. Under our practice, however, all these different forms of real actions are merged into the one action which we call ejectment: in which both the right of possession and the right of property are tried. Therefore, the same reason which made a judgment in a writ of entry or *assize* operate as a bar to a subsequent action of the same character between the same parties, would undoubtedly make a judgment in our action of ejectment operate in the same way. Hence we conclude that a judgment in ejectment, where issue is taken upon the title or ownership, will operate by way of estoppel in a subsequent action between the same parties, involving the same subject matter; such estoppel being confined to the rights and relations of the parties as they existed at the time of rendition of the judgment, and not to affect subsequently acquired rights or titles. (*Caperton v. Schmidt*, 26 Cal. 479.)

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The second assignment of error is, that the Court below erred in refusing to give instructions six, seven, eight and nine, asked by the defendant. Though these instructions correctly announce the law, they were properly refused, for the reason that they are all based upon evidence which was ruled out by the Court's instruction above referred to.

The third error complained of is, that the Court erred in giving instructions five, six and seven asked by the plaintiff. Of this complaint it is only necessary to say that the record does not show that those instructions were given by the Court; and furthermore, we are satisfied from the record that they do not belong in this case, but to the case of *Dilley v. Sherman*, and were inadvertently copied into this record by the Clerk. It is therefore unnecessary to determine whether the law is correctly announced in them or not. Had counsel shown to the Court below that the case of *Dilley v. Sherman* was on appeal at the time this case was tried, and objected to the introduction of the record in that case upon that ground, it would doubtless not have been admitted; for a verdict and judgment cannot be pleaded in bar, nor do they operate by way of estoppel whilst the case in which they are rendered is pending on appeal. That fact was not, however, called to the attention of the Court below, and cannot be made here for the first time.

The judgment of the Court below must be affirmed.

JOHN A. MCCURDY, RESPONDENT, v. THE ALPHA G. & S.
MINING COMPANY, APPELLANT.

Usually, a deed passes only what is described in the granting clause; but under modern and liberal rules of interpretation, an explanatory clause or *habendum* of a deed may cause that to pass which could by no possible interpretation be held to have been described in the granting clause of the deed.

Parties usually describe what is intended to be granted in the granting clause of the deed. And Courts should not interpret deeds so as to carry more than is mentioned in that clause, unless the intent to carry more is clearly shown in other portions of the deed.

An explanatory clause in a deed should not be so interpreted as to be repugnant to the granting clause, especially when there is not necessarily any such conflict.

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A deed may be interpreted by the aid of surrounding circumstances, which are known to, and understood by, the contracting parties. A full knowledge of surrounding circumstances may make that intelligible which would otherwise be unintelligible.

The Court and not the jury must interpret written contracts. When the existence or non-existence of certain extraneous facts must be ascertained to arrive at a correct conclusion, the Court may submit these facts to a jury. But where all the material facts are admitted by both sides, then the Court must decide.

UPON REHEARING.—The phrase "The interest herein intended to be conveyed," commented on and explained.

APPEAL from the District Court of the First Judicial District,
Hon. C. BURBANK, presiding.

The facts are fully stated in the opinion.

C. J. Hillyer, for Appellant, made the following points :

The Court erred in refusing to give the third, fourth and tenth instructions asked by defendants. These instructions were for the purpose of giving to the jury a proper construction of the deeds under which the plaintiff claimed ; that construction was for the Court, and not the jury.

The Court erred in instructing the jury that they were to construe the deed and ascertain the intent of the parties.

The instructions as given were inconsistent with themselves and with the rulings of the Court in regard to the admission of evidence.

The Court erred in excluding the testimony of John H. Mills, as to the declarations of Coppers and McCurdy.

Parol evidence is not admissible to contradict the terms of a written instrument, but it is always admissible to show the circumstances surrounding the parties, and if there be any ambiguity in the language of the writing it may be explained by parol. Parol evidence was admissible here to identify the Central Ledge, and show whether it was independent of the Gold Hill Ledge, and also to show what was understood by the terms "reach and prospect," in the deed, and to identify what ledges were included in the general clause following the designation of the Central Lode, and whether the Gold Hill Ledge was intended to be included in that clause.

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To prove these facts the declarations of Coppers and McCurdy were competent, and indeed, the best evidence. (*Leland v. Stone*, 10 Mass. 458; *Reed v. Pro. of Locks*, 17 Curtis R. 585; 1 Greenleaf Ev. Sec. 203; 1 Phillips Ev. 546; 1 Metcalf, 380; 13 Pick. 261.)

The admissions of a party are always admissible to prove any fact which may be established by parol evidence. (1 Greenleaf on Ev. Sec. 171.)

The Court erred in rejecting evidence to the effect that plaintiff, whilst prosecuting his work, disclaimed ownership in the Gold Hill Ledge. (*Stanley v. Green*, 12 Cal. 162; *Scovill v. Griffith*, 2 Kernan, 509; *Earl v. Picken*, 5 Car. & Payne, 542.)

The judgment could under no circumstances have been for more than fifty-three feet, for one of the deeds under which plaintiff claims clearly describes only the central and back ledges. As to this deed there is no ambiguity, and therefore the judgment is too large, if not entirely erroneous.

L. E. Bulkeley, for Respondent :

The deeds are not ambiguous, and they should have been construed by the Court for the jury; but the construction having been left to the jury at request of appellants, this action is final.

Even if technical errors have intervened, substantial justice having been done, this Court should not reverse the judgment. (*English v. Johnson*, 17 Cal. 107; *Merle v. Mathews*, 26 Cal. 455; *Alston v. James*, 17 Barb. 289; *Winans v. Christy*, 4 Cal. 70.)

Plaintiff was entitled to judgment on the pleadings. The pleadings, at most, only deny plaintiff's ownership: they do not deny his right of possession.

The deeds were not ambiguous, and therefore no evidence was admissible to explain them.

Opinion by BEATTY, J., LEWIS, C. J., concurring.

This was an action brought to recover 127 feet undivided interest in certain mining ground in Gold Hill. The circumstances on which the claim is founded, and which are necessary to be known to determine the rights of the parties, are as follows :

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On the ninth day of July, 1859, certain parties made the following location of a mining claim at Gold Hill :

That we, the undersigned, claim four claims of 1,200 feet, including quartz and surface, commencing at the Reverend Bennett claim and running north. This claim lies to the right of Gold Hill, U. T. Feb'y 27th, 1859.

Recorded July 9th, 1859.

T. A. HOUSEWORTH.

L. S. BOWERS,
F. D. CASTEEL,
JOS. PLATO,
W. KNIGHT.

Subsequently, three of the original locators, together with Joseph Webb, who had become associated with them, entered into the following contract :

ARTICLE OF AGREEMENT.

Joseph Webb, Joseph Plato, F. D. Casteel, and L. S. Bowers, with J. H. Mills and P. W. Coppers. Date, December 16th, 1859. Consideration, 250 feet of ground.

The parties of the second part agree to run a tunnel in a certain mining claim situated above Gold Hill, and joins on Board & Co.'s claim, belonging to the parties of the first part. We of the second parties agree to run a tunnel till we strike the ledge. For so doing we of the first part do convey and relinquish all our right of two hundred and fifty feet of ground in the above mining claims. When the parties of the second part have completed the tunnel to the ledge, then the tunnel shall become the property of both parties of the first and second part.

As witness our hands this day.

JOHN H. MILLS, } Parties of the
P. W. COPPERS, } second part.

JOSEPH WEBB, }
L. S. BOWERS, } Parties of the
F. D. CASTEEL, } first part.
J. PLATO, }

Attest: E. C. MORSE.

Recorded March 25th, 1860. Book B, p. 175. G. H. R.

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Under this contract Mills & Coppers ran a tunnel for some three hundred feet, and claimed that they had struck the ledge. At least Mills, one of the joint contractors, claimed that they had. Coppers denies that he made any such claim. But, be that as it may, the company, after some hesitation, and indeed, strenuous objection by some of its members to the claim asserted, accepted the contract as finished, and allowed the 250 feet to Coppers & Mills. Coppers did not hesitate to accept his 125 feet, although he says he did not claim the contract was finished.

After accepting the contract of Coppers & Mills as finished, and after allowing them their 250 feet, the price of the contract, the company, at its own expense, extended the tunnel one hundred feet west, making the whole tunnel 400 feet in length.

About this time it began to be supposed that back of the ledge located by Bowers and others in July, 1859, and between that and some croppings called Butler's Peak croppings, which lay up the hill considerably to the west, there might be another or other blind ledges. In order to secure these supposed ledges, the following locations were made in June and August of the year 1860 :

CENTRAL COMPANY.—*Notice.*—We, the undersigned, members of Gold Hill Tunnel Company, have this day located six claims of two hundred feet each on this supposed blind ledge, lying between the Gold Hill ledge and the Back ledge croppings, known as Butler's Peak croppings, and we do each and all of us claim and hold the same proportion in this ledge that we own and are in possession of in Gold Hill Tunnel Company, commencing at this stake and running north, or northerly, twelve hundred feet.

S. BOWERS,
JOS. PLATO,
P. W. COPPERS,
F. D. CASTEEL,
JOS. WEBB,
J. H. MILLS & Co.

Gold Hill, 22d of June, 1860.

Recorded June 23d, 1860.

CHAS. E. OLNEY, Recorder, Pr. Aldrich.

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“To all that it may concern : That the Gold Hill Tunnel Company claim twelve hundred feet of each and all ledges in this hill, from the mouth of Gold Hill Tunnel to the Back ledge commencing at Board & Co.’s claims, and run northerly twelve hundred feet.

“Gold Hill, August 14th, 1860.”

On the thirtieth of April, 1861, certain members of the company entered into a further contract with Coppers & McCurdy, the present plaintiffs, to make a still further exploration of their claims. This contract was embodied in the deeds of the members of the mining company, each member making a deed for his proportionate interest of the claim, which was to pass upon the completion of the contract by Coppers & McCurdy. We copy from one of the deeds (they were all alike in form) the material part, upon the proper interpretation of which this whole case depends :

“An undivided twenty-five (25) feet of the interest of the said party of the first part in and to the mining ground of the ‘Central Company,’ located on the 22d day of June, 1860, a full description whereof will be found in book F, page three, (3) of the mining records of Gold Hill District. The interest herein intended to be conveyed to include also and carry along with it an interest of equal extent in all the ledges and lodes in which said party of the first part is owner, and which will be reached and prospected by said parties of the second part, in their continuation of the tunnel of ‘The Gold Hill Tunneling Company ;’ said continuation commencing at a point four hundred (400) feet in and from the mouth of said tunnel.”

At the time this and other similar deeds were made, the tunnel extended already 400 feet into the hillside, running west towards the Butler’s Peak croppings. This tunnel runs for the first four hundred feet through various kinds of matter, some of which seems to be admitted by all intelligent witnesses to be *vein matter*. But the opinion of most of the witnesses who claim to be experts is, that whatever of vein matter was passed through in this four hundred feet of the tunnel was mere *tumble rock*, as they term it : that is, that it was merely part of the vein matter which had fallen from the vein and rolled down the hill. That the true vein confined between the regular wall rocks was not found or explored until it was struck

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in the tunnel by Coppers & McCurdy, at a distance of four hundred and twenty feet from its mouth.

These are all admitted facts, with this exception: that the defendants claim that the true vein within its walls was struck within the first four hundred feet of the tunnel; and that what the plaintiff calls the east wall of the ledge, say four hundred and twenty feet from the mouth of the tunnel, is nothing more than a seam or crack in the ledge.

It is also an admitted fact that there is but one ledge there—at least, but one has ever been discovered or prospected.

With these admitted facts, the question to be determined is, what ground, if any, passed by the deeds of the thirtieth of April, 1861. The granting words of said deed are as follows:

“Do grant, bargain, sell, and convey unto parties of the second part (McCurdy & Coppers) an undivided ——— feet of the interest of the said party of the first part in and to the mining grounds of the Central Company, located on the 22d day of June, 1860, a full description whereof will be found in Book F, page three, of the Mining Records of Gold Hill District.”

Here there is a distinct reference to the location made on the twenty-second of June, 1860. That location is of 1,200 feet “on this supposed blind ledge, lying between the Gold Hill ledge and the Back hill ledge croppings, known as Butler’s Peak croppings.” The granting words of the deed, then, taken in connection with another written paper to which they refer, clearly confine the grant to a ledge or ledges lying between the Gold Hill ledge and the Butler’s Peak ledge, and by the most positive implication *exclude* the Gold Hill ledge. But this *granting* clause is followed by an *explanatory* clause, which is in these words:

“The interest herein intended to be conveyed to include also and carry along with it an interest of equal extent in all the ledges and lodes in which said party of the first part is owner, and which will be reached and prospected by said parties of the second part in their continuation of the tunnel of the ‘Gold Hill Tunneling Company,’ said continuation commencing at a point four hundred (400) feet in from the mouth of the tunnel.”

Now this explanatory clause is entitled to all due weight, and

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under the liberal rules adopted by the more modern decisions in the interpretation and enforcement of deeds, it might, perhaps, even have the effect of passing title to that which by no possibility could be understood as having been included within the granting clause of the deed. But, before giving such effect to mere explanatory words, it should appear from the instrument, beyond all reasonable doubt, that it was the intent of the parties using the words to give them such effect. Parties usually describe in the *granting* clause of a deed all that they intend to convey. And no Court should hold that a party by his deed has conveyed more than is described or referred to in the *granting* clause, unless forced to that conclusion by language in other portions of the deed which clearly and beyond all reasonable doubt shows an intent on the part of the grantor to part with more property than was described in the *granting* clause. This explanatory clause, although not strictly the *habendum* of the deed, is somewhat similar to the *habendum*, and it appears to us should be construed in the same way.

In the text of Bacon's Abridgment, vol. 4, page 529, title Grant, we find this language: "That the *habendum* cannot pass anything that is not expressly mentioned or contained by implication in the premises of the deed, because the premises being part of the deed by which the thing is granted, and consequently that make the gift, it follows that the *habendum*, which only limits the certainty and extent of the estate in the thing given, cannot increase or multiply the gift."

And in the American note to this part of the text we find these expressions: "It is clear by the current of all the authorities, that an *habendum* may enlarge, expound or qualify, and vary the estate granted in the premises, * * but it must not contradict or be repugnant to such estate."

Now, as the estate granted in the premises of this deed was *between* the Gold Hill ledge and another ledge, to make the explanatory clause *include* the Gold Hill ledge would be to make it *include* that which the premises by necessary implication *excluded*. Thus an absolute repugnancy is brought about between the *granting* and explanatory clause of the deed.

But necessarily there is no such conflict. If we interpret the

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language used in the granting part of the deed and the explanatory clause, aided by the light of the surrounding circumstances which were known to the contracting parties, all difficulty seems to vanish. The location of the twenty-second of June, 1860, was of a blind or unseen ledge, supposed to be central between two other ledges, the existence of which was known and ascertained, or at least supposed to be known and ascertained. But in August, 1860, which was before this deed was made, another location was made upon the theory or supposition that there might be a number of *blind* ledges between the two known ledges. Now, if there were a number of such ledges, the question might arise which one was the *true central* ledge. They might all be between the two ledges, and yet no one in a position exactly central or equidistant from the two known ledges. Hence, it was eminently proper to explain that all lodes discovered by the contractors between the two known lodes should be held as central lodes, and should pass under the general expression, "mining grounds of the Central Co." But it will be contended that the words "ledges and lodes * * which will be worked and prospected by said parties of the second part" are general and comprehensive words, and must include all ledges which are reached and found west of a point 400 feet west of the mouth of the tunnel. It is true such is the natural import of those words, and the meaning which would have to be attached to them if their operation was not restricted by other language in the instrument, and their import explained by surrounding circumstances. In the first place, the granting clause and this clause being in conflict, the granting clause must prevail, unless it is apparent such an interpretation would defeat the intention of the parties. If we look to the circumstances surrounding the parties when the contract was made, it would appear to us altogether probable that they never intended to grant any part of the Gold Hill ledge proper. The grant was for a *blind* ledge or ledges not yet discovered, and the existence of which was problematical. The existence of a Gold Hill ledge seems to have been admitted by all parties. That there was such a ledge, no one seemed to doubt. It is assumed to exist in the location made in June, 1860, and the Company had allowed Coppers & Mills 250 feet for striking and prospecting it.

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The deed to Coppers & McCurdy seems to have been made upon the supposition that the Gold Hill ledge had been discovered. Upon this hypothesis, and upon no other, can we reconcile the different clauses of the deed.

Now, if the parties did suppose the Gold Hill ledge proper had been reached and prospected before this deed was made, the grantor did not intend to convey any part of said ledge. As the granting words do not include such ledge, and as the probabilities are at least equal that the grantor, in using the explanatory words, had no idea of including any interest in the front ledge, whether the same had or had not been discovered, we feel bound to confine the grant to what is included within the natural signification of the granting words.

The Court, and not the jury, must interpret written contracts. It is true, that when it is necessary to ascertain the existence or nonexistence of facts to be proved by parol, to enable the Court to interpret a contract, and these facts are contested, they must be submitted to a jury. (See Parsons on Contracts, vol. 2, p. 1 *et sequiter*, and notes.) But in this case there was really no dispute as to the main facts of the case; and admitting all the disputed facts to have been as plaintiff claims, still the proper interpretation of the instrument would defeat the action.

The Court below should have granted the nonsuit asked for by defendants. It is true, the statement of the grounds upon which a nonsuit was asked for are not in such form as would seem most appropriate; but there was an utter failure to show defendants in possession of the ground mentioned in the deeds on which plaintiff founded his right.

The judgment must be reversed. Ordered that the judgment be reversed, and a new trial granted.

UPON REHEARING.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

A rehearing was granted in this case, mainly because the point on which it was decided was not discussed in the original argument of the case, and only slightly alluded to in appellants' brief.

On the argument, counsel for respondent made but two points in opposition to the views of the Court as expressed in the former opinion. The one, that the clause which the Court calls an explanatory clause of the deed is not properly explanatory, but is a clause conveying something in addition to what is conveyed by the preceding sentence. The other, is that the word *also* necessarily implies that something is conveyed *in addition* to that described in the preceding sentence, whilst the Court treats the second sentence as not conveying anything in addition, but merely *explaining* what was described in the foregoing sentence.

The two sentences read thus : "An undivided twenty-five (25) feet of the interest of said party of the first part in and to the mining ground of the Central Company, located on the 22d day of June, 1860, a full description whereof will be found in book F, page three, (3) of the Mining Records of Gold Hill District.

"*The interest herein intended to be conveyed to include also and carry along with it an interest of equal extent in all the ledges and lodes in which said party of the first part is owner, and which will be reached and prospected by said parties of the second part in their continuation of the tunnel of the 'Gold Hill Tunneling Company,' said continuation commencing at a point four hundred (400) feet in from the mouth of said tunnel.*"

In the latter sentence we have italicised those words which we think clearly show that it was intended as an explanatory sentence. If it had been intended to make a conveyance of lodes not included within the description of the first sentence, but something entirely distinct therefrom and in addition thereto, surely the italicised words would have been left out. Any one not wholly ignorant of the use of the English language, would have seen that the italicised words, instead of helping to express the idea contended for by respondent, were plainly at war with that theory. No one would have used those words to express the intention of making a conveyance of something entirely distinct from that described in the preceding sentence.

The word *also* certainly implies something in addition to what has gone before, and we have given it that signification. The location of June, 1860, was only of "*this supposed blind ledge,*" between

Stonecifer v. The Yellow Jacket Silver Mining Company.

two other ledges. Here was only a single ledge between other ledges. The first sentence then only describes a single ledge, but the explanatory words declare in effect that this shall mean *also all* blind ledges between the two outside ledges described in the location of June, 1860.

The former judgment of this Court will stand as the judgment in this case.

WILLIAM STONECIFER, RESPONDENT, v. THE YELLOW
JACKET SILVER MINING CO., APPELLANT.

The doctrine that he who buys land with a full knowledge that there is a pre-existing contract in regard to the sale of the same, will be held in equity to carry out that contract, has no application to a case where the party seeking the equitable relief never was entitled to a conveyance from the party with whom he contracted, and when that party never in fact had any title to convey.

Where A claims an interest in a piece of real estate, and being out of possession conveys his alleged interest to B, for the purpose of enabling him to prosecute a suit for the same, with an agreement on the part of B to reconvey a portion of the property, if recovered, B has full power to compromise the suit, even without the consent of A, and the title would be established by a judgment and deed, in pursuance of such compromise. A might be entitled to an action against B for damages, but would have no claim on the land. If A consented to the compromise made by B, certainly a third party having a contract with A for the conveyance of a portion of his contingent interest, would not be allowed to question the title of the parties in possession who compromised with A and B, and obtained a deed for whatever title B had.

ON REHEARING.—When A takes a conveyance for land in the adverse possession of another, with an agreement, in case of recovery, to convey part of the land recovered to B, can he be considered a trustee for B until the recovery is had?

Where a party who is prosecuting a suit for the recovery of land covenants, in case of recovery to convey a part of the land recovered to another, and afterwards compromises the suit so as to prevent the possibility of recovery, he may be liable to his covenantee in damages, but the party in possession, who compromises the suit, is not affected by the previous existence of this covenant.

If the compromise had been fraudulently entered into by both parties, with a view of cheating the covenantee, then a Court of Equity might have given relief.

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- A party in possession always has a right to buy his peace from one asserting an adverse claim, and such compromises will always be upheld where there is no fraud committed.
- A party who has covenanted to convey, in the event of recovery, may be under obligation not to compromise the case so as to prevent the possibility of recovery. But no such obligation rests on defendant: he has a perfect right to buy his peace, regardless of all contracts between his opponent and others.
- The Court cannot, in an equitable proceeding, try the title to land, nor determine in such a case what should have been the judgment in an action of ejectment formerly pending in regard to the same.
- A party being in possession, claiming title, cannot be divested of that possession without a trial at law before a common law Court and a jury.

APPEAL from the District Court of the First Judicial District, the Hon. RICHARD S. MESICK, presiding.

The facts of the case are fully stated in the opinion.

Hillyer & Whitman made the following points for the Appellant:

The Court below should have sustained the demurrer to the complaint, for it shows no cause of action.

A specific performance of a contract can only be decreed where such contract is binding at law. (Adams' Equity, p. 77.)

In this case the agreement of Jones, set forth in the complaint, was void for want of consideration. It depended on contingencies which never happened. There was no mutuality of contract between Jones and Stonecifer — contract must be mutual to have specific performance. (*Benedict v. Lynch*, 1 John. Ch. 370; *German v. Machin*, 6 Paige, 288; *Woodward v. Harris et al.*, 2 Barb. 439; *Rogers v. Saunders*, 4 Maine, 92; *Boucher v. Van Buskirk*, 2 A. K. Marshall, 346; Adams' Equity, 3d Ed., p. 252, foot-note and cases there cited; *Cooper v. Pena*, 21 Cal. 404.)

The agreement of Osborne, as set forth in the complaint, was void, not being in writing.

The complaint shows that defendant is a corporation. It is not within the scope of the powers of a corporation, formed under the Statutes of Nevada, to perform the act demanded by plaintiff. The complaint shows no special case of hardship, nor any reason why plaintiff could not be compensated in damages.

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It shows no cause of action against defendant.

For the same reasons, the judgment of the Court was against law.

It was contrary to the evidence. Jones' evidence shows that he never made any claim to a quartz lead.

The record of the agreement set forth in the complaint was no notice to defendant.

No actual notice was proven. If defendant would have been liable in case of notice, without such notice there was no liability.

The Court erred in the judgment. If defendant was liable, it was only liable to perform the contract of Jones. The Court has decreed none.

Hundley & Mitchell, for Respondent, made the following points :

1. Defendant being a purchaser with notice of plaintiff's contract, will be decreed to convey. (1 Story Eq. Jurisprudence, 754, Sec. 784; also, Sec. 395; *Champion v. Brown*, 6 John. Ch. Rep. 402; *Potter v. Sanders*, 6 Hare Rep. 1; 31 Maine Rep. 89; 3 Leading Cases in Equity, 91; *McMorris v. Crawford*, 15 Ala. Rep. 271; *Dickinson v. Aug*, 25 Ala. Rep. 424; *Wiswall v. McGowan*, 1 Hoffman, 125.)

2. A purchaser of real estate is liable to all equities of which he has actual or constructive notice. (2 Leading Cases in Equity, 182; 8 Wheaton, 421; 9 Peters, 86; 2 B. Monroe, 105; 4 Blackford, 583; 1 Johnson Ch. Rep. 566; 2 Id. 300; 2 McCord, 149; 5 Barbour S. C. 534; 1 Yerger, 29; 1 J. J. Marshall, 403.)

3. The defendant had knowledge of the Jones and Stonecifer contract; it was recorded. (Laws of 1861, pp. 14 and 15, Secs. 24-25.)

4. Plaintiff and defendant claim from a common source; it is estopped from disputing such source of title or its validity.

5. If defendant claimed under a superior title to the common source, he must plead such title, and if not pleaded he is estopped from denying the validity of the common title. (13 Smede & Marshall's Rep. 108-109; 11 Smede & Marshall, 327; 3 Smede & Marshall, 114.)

6. Plaintiff shows that the nonperformance of covenants was excused. That defendant prevented the performance or rendered it unnecessary. (1 Chitty Pr. and Pl. 325, also 320; 2 Smith's Leading Cases, 44, and authorities cited; *Newcomb v. Bracket*, 16 Mass. Rep. 161; *Webster v. Coffin*, 14 Mass. Rep. 196; *Clark v. Moody*, 17 Mass. Rep. 149.)

A failure or want of consideration cannot be given in evidence, or be pleaded as against a specialty. (2 Johnson Rep. 177; 13 Id. 430; 5 Cowen Rep. 506; 8 Id. 290; 21 Wendell Rep. 626; 21 Cal. Rep. 47.)

A complaint on a sealed instrument need not aver a consideration, because a consideration need not, in the first instance, be proved. (1 Van Sandfordt Pr. and Pl. 221; *Livingston v. Tremper*, 4 Johnson Rep. 416.)

The complaint avers consideration, which is not denied by defendant.

The Court will only consider in this case the judgment roll. There are no findings of the Court below, and defendant has not taken the exceptions required by statute. (Laws of 1865, p. 394.)

Haydon & Denson, for Respondent, also filed a brief in support of the foregoing points.

Mitchell & Hundley, in their petition for rehearing, sum up the points on which they rely, as follows:

"First.—As the case was decided upon demurrer, all the facts stated in the complaint were admitted to be true.

Second.—The facts as shown by the complaint.

Third.—That the facts as disclosed made J. A. Osborne, as to the seventy feet, a trustee for Jones, and that their relation as to that interest was that of a trustee and *cestui que trust*.

Fourth.—That as to this seventy feet, the relation the parties bore to it was that Osborne was legal owner, and Jones an equitable owner.

Fifth.—That the interest which Jones held in this seventy feet was the subject of sale by him, or liable to be disposed of by operation of law *in invitum*.

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Sixth.—That respondent took the same interest that Jones had prior to the assignment of the ten feet.

Seventh.—That the effect of the contract between Jones and respondent, *in equity*, was an assignment of his interest in the ten feet.

Eighth.—That Osborne, after the assignment from Jones to respondent, occupied to respondent the same position he did to Jones prior to that time.

Ninth.—That no acts of a trustee can prejudice the rights of a *cestui que trust*, with knowledge upon the part of the person dealing with him that he is a trustee.

Tenth.—That Osborne, or his administrator, could not sell or compromise any greater interest than he had: as he held the estate in trust, he sold and conveyed to defendant (it being affected with notice) the trust estate subject to the trust in its hands, the same as it was in Osborne's.

Eleventh.—That the defendant purchased the *whole property* with notice of this trust, and they must now execute it.

Twelfth.—That the deed from Jones to defendant did convey his equity in seventy feet to the defendant.

Thirteenth.—That plaintiff did have two remedies—one against Jones for damages, and the defendant for a specific performance—it having purchased with notice."

Opinion by BEATTY, C. J., BROSNAN, J., concurring.

The appellant, in the month of March, 1865, filed his complaint, alleging substantially the following facts:

That one Lyman Jones, on the first of May, 1859, located a certain mining claim two hundred feet square, which covers a part of the claim now occupied and worked by the defendant. That on the thirtieth of September, 1861, Jones deeded this claim to one Osborne by deed absolute on its face, but with an understanding or agreement that Osborne was to prosecute an action at law, at his own expense, for the recovery of the ground from which Jones had been ousted, and upon recovery he was to reconvey seventy feet to Jones. That on the same day, Osborne conveyed to his counsel—Smith, Clayton & Lindsey—fifty feet of the claim as a counsel fee for prose-

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cuting the suit. That in March following (1862) suit was commenced against the Yellow Jacket Company (not then incorporated) for the mining claim located by Jones. In the spring of 1863, whilst this suit was still pending, Jones made a contract with the plaintiff whereby he bound himself to deed ten feet of this claim to plaintiff in the event Osborne or Osborne's administrator (for Osborne himself was dead) recovered from the Yellow Jacket Company, and conveyed to him, Jones, the seventy feet about which there was an agreement between Jones and Osborne, when the deed was made to Osborne. Shortly after this agreement was made, the suit of Osborne (or his administrator) against the Yellow Jacket Company came on for trial, and the plaintiff took a voluntary nonsuit.

In the course of that year two new suits were brought against the Yellow Jacket Company: one by Smith, Clayton & Lindsey for their fifty feet, the other by Osborne's administrator for the remaining one hundred and fifty feet. In March, 1864, both these suits were disposed of in the following manner:

On the seventh day of March, Smith, Clayton & Lindsey filed a written consent that judgment for costs might go against them.

They subsequently conveyed their interest in the mining claim to the Yellow Jacket Company. The administrator of Osborne on the ninth of March filed a like written consent that judgment might go against him for costs. He had however, previous to that day, conveyed all his interest in the mining claim to the Yellow Jacket Company.

The complaint, in speaking of this written consent on the part of Osborne's administrator that the judgment should be entered against him for costs, says: "That the consideration moving plaintiff in said cause for the filing of such written consent as aforesaid, and the entry of such judgment, was the purchase by defendant of the said Lyman Jones of his right, title and interest to said mining claim, and the purchase by said defendant from the said W. B. Hickock, administrator of the estate of J. A. Osborne, deceased, as aforesaid, of his right, title and interest in and to said claim."

Subsequent to the dismissal of the suit, Jones conveyed all right, title and interest in the claim to the Yellow Jacket Company. The

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bill further charges, that when the Yellow Jacket Company took their conveyance from Osborne's administrator and from Jones, it had notice of the agreement about the ten feet between this plaintiff and Jones, and also of the Jones and Osborne agreement as to the seventy feet.

The bill concludes with a prayer that the defendant be compelled to convey ten feet undivided interest in the mining ground described; for costs, etc. The defendant first demurred, and on the demurrer being overruled, then answered. The case went to trial, and a decree was rendered in accordance with the prayer of the complaint.

The case should have been disposed of on demurrer, and it is therefore unnecessary to notice the answer or proof in the case. Respondents claim that they were entitled to a decree against the appellants because they took a conveyance from Jones whilst there was an existing contract, of which respondents had notice, between Jones and respondents for the conveyance of this ten feet of ground. No principle is better settled than that if A. contract to sell land to B, but before consummating the sale conveys the same land to C, who has a knowledge of the preëxisting contract, C is in equity bound to fulfill that contract.

But that principle is wholly inapplicable to this case, for at least two good reasons: First, Jones never was bound to convey anything to plaintiff; and second, he never sold or conveyed anything to defendant.

Jones' contract to convey to plaintiff depended on two conditions: First, that Osborne should recover from the Yellow Jacket Company; second, that having recovered from that company, he should convey seventy feet to Jones. Now, neither Osborne nor his administrator ever did recover from the Yellow Jacket Company, nor did they ever convey seventy feet to Jones.

Now, if Jones himself never was bound to convey, how is it possible that those holding under him (admitting there is any title held by conveyance from him) could be bound to convey by reason of the derivation of title from him?

But it may be answered that although the conditions never arose on which Jones was to convey, yet he himself became a party to

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the compromise of the suit against the Yellow Jacket, and thereby prevented the happening of the contingency on which his liability to convey depended. This is 'all true, and we may admit that Jones thereby became liable to plaintiff in the proper form of action for whatever injury was done to plaintiff by that compromise. But in such case, the plaintiff's remedy, if any, was a pecuniary compensation for his loss. It was not by a conveyance from Jones, for Jones, after the compromise, had nothing to convey. That remedy must have been against Jones alone.

If one covenant to sell or convey land, and refuses to carry out that covenant, the covenantee has two remedies against him. One, an action at law for damages; the other, a bill for specific performance. Whilst the latter remedy may be enforced against either the original covenantor or his vendee with notice, the former can only be enforced against the original party. If, then, Jones violated his covenant by assenting to the compromise, he became personally liable; but that was a liability that could only affect him or his personal representatives in case of his death.

Again, on the other point. The suit between Osborne's administrator and the Yellow Jacket Company was compromised in February or March, 1864. The complaint avers that the administrator made a deed of all Osborne's interest in February, and by consent judgment was rendered for defendant on the 9th of March, 1864. Now if Jones ever had any interest in the mining claim, the whole of it (except what was deeded to the lawyers, and that is not here brought in question) passed to the Yellow Jacket Company by the deed of February, 1864, and the judgment of March 9th, 1864.

There was not a shadow of title or claim of any kind left to Jones. Consequently the deed which he subsequently executed was no more than a mere piece of waste paper. It conveyed nothing because he had nothing to convey.

The conveyance to Osborne by Jones was absolute on its face. It was made for the express purpose of allowing Osborne to prosecute the suit. If he had a right to prosecute the suit he had a right to compromise it. At least the Yellow Jacket had a right, in order to protect their possession, to compromise the suit with

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him, and if the title passed by such compromise it would be available to them. If Osborne, in making such compromise, violated his contract with Jones, he might be personally liable, but this could not affect the Yellow Jacket Company.

If Osborne had the right to compromise the case without Jones, certainly the fact that Jones assented to the compromise could not invalidate it.

The complaint alleges in substance that he was a party to the compromise which was consummated by the entry of judgment on the ninth of March, 1864, but his deed was not made for months afterwards. The facts stated in the complaint show no grounds of action against the Yellow Jacket Company. The judgment of the Court below must be reversed, and the bill dismissed. It is so ordered.

RESPONSE TO PETITION FOR REHEARING.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

In the petition for rehearing in this case, it is urged with much earnestness by the attorneys for respondent that the conveyance from Jones to Osborne, with the contemporaneous agreement between them, raised a trust in favor of Jones; that the relation of trustee and *cestui que trust* was thus established between them as to the seventy feet to be reconveyed. It is then claimed that Jones, the *cestui que trust*, had the right and was possessed of the power either to convey *in presenti*, or bind himself to convey at some future day, his entire interest in the trust property, even before it was recovered from the defendant; that he did covenant to convey one-seventh of his interest to the plaintiff; that defendant having received a conveyance from Jones and Osborne of all their interest in the property, with notice of the trust, and of Jones' agreement to convey to the plaintiff, is bound by the trust and may be compelled to convey to him in accordance with Jones' obligations.

In our opinion it is a matter of no consequence whatever to the plaintiff in this case, whether the relation of trustee and *cestui que*

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trust existed between Osborne and Jones or not; and we are of opinion at present that no such relation did exist. The common law which prevailed in the Territory of Nevada at the time of the execution of that deed, unmodified as it was by any such statute as that which we now have, forbade the transfer of any disputed title or right, whether relating to real or personal property by the person out of possession, and made all such transfers utterly void. (4 Blackstone's Commentaries, 135; *Hyatt v. Thompson*, 3 Sanford's R. 430; Rawle on Covenants for Title, pp. 32-33.) The deed in question from Jones to Osborne was executed whilst the defendant was in open, adverse possession of the premises, and indeed it was executed for the express purpose of enabling the grantee to bring suit to recover the possession of the premises sought to be recovered. If, therefore, we should follow the rule of the common law, the deed in question would have to be treated as a nullity. Whether it was valid or not, however, is a question not necessary to be determined in this action, because it can make no difference to the plaintiff, so far as his rights in this action are concerned, whether it was void or not. It may, therefore, be left entirely out of this case without injury to him, and without any modification of his rights. Leaving Osborne out of the case, and passing over the question as to his duties and responsibilities, and Jones' rights in his character of *cestui que trust*, which are matters not necessary to be discussed in the disposition of this appeal, we have then to determine what interest or rights the plaintiff acquired by the instrument executed to him by Jones, and how those rights were affected by the conveyance and compromise which subsequently took place between Osborne, Jones and the defendant.

The learned Judge below treated the instrument from Jones to the plaintiff as an absolute obligation to convey ten feet of the Yellow Jacket ledge to the plaintiff, whilst in fact the obligation was merely contingent—depending entirely upon a recovery by Jones from the defendant. It is clear beyond all question that the plaintiff was to have nothing unless Jones' title proved to be superior to that of the Yellow Jacket Company. Hence the only interest which the plaintiff acquired by that instrument was an interest in the action of ejectment which was then pending against the defend-

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ant in the District Court, than which nothing could be more uncertain or precarious. Of this the plaintiff was fully cognizant. He knew that Jones had obligated himself to convey nothing but the doubtful fruits which might be realized from a lawsuit; that he could obtain nothing except through a decision of the Courts favorable to the Jones title.

It is conceded that no such decision was ever had, that the action instituted to test the validity of that title was compromised, and that a judgment was rendered in favor of the defendant for the costs. If the failure to recover in that action was *bona fide*, and not owing to any breach of faith or unwarrantable negligence on the part of Jones, the plaintiff would have no right of action, even against him—much less against the defendant. But it is claimed Osborne and Jones prevented a recovery by the compromise of the action against the defendant, and the conveyances which they executed to it at that time; that they had not the authority or right to compromise the plaintiff's rights, or to defeat them by a conveyance of their interest in the property to the defendant. True, they had no such right; but we are fully of the opinion that the effect of the compromise and conveyances was to defeat the happening of the event upon which the plaintiff was entitled to a conveyance, and to confine his remedy to an action for damages against Jones. The legal title to whatever interest Jones or Osborne had to the mining claim having passed to the defendant by means of the conveyances executed to it, it is clear that they cannot maintain an action of ejectment against it; and as the plaintiff has a mere equity, if anything, he can maintain no such action. Hence, we conclude the event cannot transpire upon which the plaintiff was entitled to a conveyance of the ten feet of ground which he is claiming. But the defendant having been a party to the transaction by which the recovery against it was rendered impossible, can a Court of Equity for that reason treat the case as if a recovery had been had, and hold the defendant responsible accordingly? We think not. If it were shown that by fairly prosecuting an action against the defendant, Jones would probably have recovered the interest claimed by him, but instead of doing so, entered into a compromise by means of which the defendant obtained judgment, the plaintiff could

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doubtless have maintained his action against him for damages. In two cases only, however, could the defendant render itself liable to have the trust forced upon it, and a specific performance decreed against it: First, by fraudulently or wrongfully preventing the transpiring of the event upon which the plaintiff was entitled to a conveyance; and, Second, by purchasing an estate charged with a trust, with notice of the existence of such trust. If the compromise were entered into in fraud of plaintiff's rights, and the defendant was a party to that fraud, knowing Jones' title to be good, and superior to its own, clearly a Court of Equity would force the trust upon it, and compel a conveyance to the plaintiff. But the Yellow Jacket Company, like any other litigant, had a perfect right to compromise any action instituted against it—to buy its peace, to protect itself from protracted and vexatious litigation—by any fair means within its power. This is what it seems to have done. It is not charged in the bill in this suit that there was any fraud in that compromise, or that it was entered into for the purpose of defrauding the plaintiff or defeating his rights. If by fairly compromising an action against it any rights of the plaintiff were destroyed, that was a misfortune resulting from the peculiar nature of his rights, rather than from any wrong on the part of the defendant. It may have considered the Jones claim or title to the premises occupied by it utterly worthless, and yet compromised the action brought against it upon that title, for the purpose of ridding itself of harassing litigation. If such was in fact the case, it would be monstrous injustice to hold that such compromise amounted to an establishment of the superiority of the Jones title over that of the defendant, and that thereupon the plaintiff is entitled to recover.

True, that he had not recovered, or could not recover from the defendant, would be no defense to Jones, if he defeated such recovery by his own act, for he had no right to place himself in a position where he could not fulfill his obligations to the plaintiff; but the defendant was under no such obligations. It did what it clearly had a right to do, regardless of the effect it might have upon the rights of the plaintiff. There was nothing, therefore, in the action or conduct of the defendant which constitutes any answer to the objection that the fact upon which the plaintiff was entitled to a

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conveyance has not yet transpired, or that will relieve him from the necessity of showing a right of recovery by the strict letter of the instrument executed by Jones to him.

The same objection to the plaintiff's right of recovery may be urged, if it be attempted to charge the defendant as a purchaser of the Jones claim with notice of the existence of the instrument which had been executed to the plaintiff. But it was held by the Court below that the question of title between Jones and the defendant could be determined in this suit, and that if it were found that the Jones title was superior to or better than defendant's, the plaintiff would be entitled to recover precisely the same as if that fact had been determined in the action of ejectment which was compromised by the parties, or as if the fact had transpired upon which the plaintiff's right to a conveyance depended. We are, however, fully satisfied the Court below was wrong upon that point. The defendant has a right to have the question of title between itself and Jones determined by a jury in an action of law. It cannot be deprived of that right by the findings of the Court in a proceeding in equity. The defendant being in possession of the property, there is but one way by which the title between it and another claiming adversely can be tried, and that is by an action of ejectment, and the plaintiff in such action can rely only upon a legal title. A mere equitable right or title would not be sufficient to entitle him to recover. Here the plaintiff has a bare equity, and his bill is filed simply to obtain a decree to force a trust upon the defendant, and to compel its execution. The question of title between Jones and defendant cannot, therefore, be determined in this suit. We are aware that the compromise and the conveyance from Jones to the defendant would constitute a complete defense to an action of ejectment, but, as we stated before, the defendant is not responsible for that fact.

It is undoubtedly true that equity will enforce a trust not only against those persons who are rightfully in possession of trust property, but also against all persons who came into possession of the property bound by the trust with notice of such trust. But the trust can only be forced upon the legal estate acquired by the purchaser. It cannot be enforced so as to bind other property belonging to him. It simply follows the legal estate to which it is attached.

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When that is destroyed the trust is extinguished. Until it is legally established that the Jones title is superior to that of the defendant, there is no evidence that the defendant acquired anything by the conveyance from Jones. It was in open adverse possession of the property, upon which the plaintiff is attempting to force the trust, at the time it took the deed from Jones. The defendant doubtless acquired whatever interest he had in the Yellow Jacket ledge, but what that interest was, if anything, has not yet been properly determined. It is quite evident that no Court of Equity will force a trust of this character upon the defendant, until it is proven that it acquired some estate or property from its grantor, for if its grantor had nothing, the plaintiff is entitled to nothing. It is claimed that in a proceeding of this kind, if the party against whom the trust is sought to be enforced claims by a superior right of his own, it is necessary for him to set up such title; that in this case the defendant has not set up or alleged that it had any such superior title, or any other than that which it acquired from Jones; that by the pleadings it is invested with the possession and with no other title, except that which it acquired from Jones. We can draw no such conclusions from the pleadings presented to us.

The defendant in its answer denies that Jones ever took up, located or entered into possession of any part of the ledge occupied by it, (which is a denial of the allegation in the bill) but admits the location of a surface claim in the vicinity of such ledge; then it is explicitly alleged that the conveyance from Jones and Osborne was taken simply for the purpose of compromising the action which had been instituted against it, and that the Jones title was not a valid claim to the premises occupied by it, or any part thereof, and was never so regarded; that in taking such conveyance it was not the intention to acknowledge the validity of the Jones title. There is certainly sufficient in the pleadings to show that the defendant claimed the mining ground by title superior to that asserted by Jones, and in its answer it explicitly denies that Jones had any valid title. Again, the very instrument upon which the plaintiff hinges all his rights shows that the defendant was in possession and claiming adversely at the time of the execution of the deed, and that he was entitled to an interest in the premises only upon a re-

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covery from the defendant, and the pleadings clearly show that no recovery was ever had. Hence, the defendant, having possession all through and having recovered judgment in the action brought against it upon the Jones title, the presumption is surely very strong that the defendant had the superior title.

Rehearing denied.

PAUL MAVRICH, RESPONDENT, v. J. W. GRIER AND
HARRIET SMITH, APPELLANTS.

A party taking a conveyance of real estate in trust for a married woman, may mortgage the same to secure the purchase money, the conveyance and mortgage being executed at the same time, and being part of the same transaction; and the fact that the *cestui que trust* at the same time executes her note (which is void because of her coverture) for the purchase money, does not invalidate the mortgage. Nor does her signature to a mortgage to which she is not properly a party, in any way affect its validity.

When a mortgage is executed by a trustee upon the trust estate, the *cestui que trust* is a necessary party to a suit for foreclosure, and if the *cestui que trust* is a *feme covert*, her husband is also a necessary party.

APPEAL from the District Court of the First Judicial District,
Hon. C. BURBANK, presiding.

The facts of the case are fully stated in the opinion.

C. E. DeLong, for Appellant:

The husband of Mrs. Smith was a necessary party, and it was error to enter up a decree without making him a party. (Statutes of 1861, Sec. 7, p. 315.)

Mrs. Smith, being a married woman at the time of conveyance to Grier, was incapable of purchasing land, or making either note or mortgage: therefore the note and mortgage are both void.

If the note was invalid, the mortgage given to secure that note was equally invalid. The mortgage is a mere incident to the debt. (5 Cal. 502.)

The relation of debtor and creditor must exist between the parties to a mortgage. (*Hickok v. Low*, 10 Cal. 206.)

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A married woman has no power to execute a mortgage to secure a note given by her as a *feme covert*. (*Simpers et al. v. Sloan*, 5 Cal. 458.)

The husband was a necessary party to this action, because the land having been acquired during coverture was community property, and inured to the benefit of the husband.

David Bizler, for Respondent :

Grier was created a trustee for Harriet Smith, by the deed under which he held ; no appointment was necessary to make him a trustee. (Hill on Trustees, 95-97 ; marginal notes, 63-65.)

In this case, the only evidence that Harriet Smith was a married woman is in her own testimony. Being incompetent to testify in the case, either under the common law rule, or under our statute, her testimony on this point was wholly immaterial.

The failure to object on the part of the plaintiff made no difference : she could not have been made a competent witness even by consent.

It is contrary to public policy to allow a wife, even by consent of parties, to testify in any case where her husband is interested. (1 Greenleaf Ev., Sec. 334 ; Norris' Peak on Ev. 249.) There is no finding of fact on this point. We may presume, therefore, the Judge wholly rejected the evidence.

Admitting, for the sake of the argument, that Harriet Smith is a married woman : can she now take advantage of the nonjoinder of the husband ? That part of the answer setting up her coverture is in the nature of a plea of abatement. This plea should have been disposed of before going to trial on the merits. If found in her favor, (supposing appellant's theory to be correct) her husband should have been made a party. But, having proceeded to trial on the merits, without previously disposing of the plea, the objection comes too late now.

This transaction took place before we had any statute in regard to community property, and must be tested by common law principles. In equity a married woman was treated, as to her separate property, as a *feme sole*, and incident to her ownership was the power of disposing of property without the consent of her husband

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(*Fittiplace v. Gerges*, 1 Ves. Jr. 46; *Sturgis v. Corp*, 13 Id. 190; *Essex v. Atkins*, 14 Id. 542); or, without the consent of her trustee, unless restrained by the terms of the instrument under which she holds. (*Jaques v. Methodist Church*, 17 Johnson, 548.)

In Courts of law, it is held that a married woman cannot legally execute a note, "yet, when such note or contract is made by her, for the benefit of her separate estate, or for her benefit, with the intention of charging it upon her separate estate, or where the consideration is obtained for the benefit of the estate, in equity, the note is valid and the estate chargeable with it." (*Francis & Baker v. Ross*, 17 How. P. R. 561; *White v. Storey*, 28 Id. 173-81; *Yale v. Dederer*, 22 N. Y. 450; *Yale v. Dederer*, 18 Id. 265; *Taylor v. Glenney*, 22 How. P. R. 240; *MacLay v. Love*, 25 Cal. 367, 379, 380, 381; *Dyett et al. v. North American Coal Co.*, 20 Wend. 570.)

In the case at bar it is alleged in the complaint, and not denied in the answer, that to secure the payment of the consideration and purchase money of the premises, and in consideration of the conveyance to Grier, in trust for her, she made the note in question; and that at the time of the execution and delivery of the conveyance by the plaintiff to Grier, and as one of the conditions thereof, and at the time of the execution and delivery of the note, Grier, at the special instance and request of Harriet Smith, made and delivered the mortgage.

The mortgage itself sets forth that it was intended to "secure the payment of the sum of two thousand dollars, the *purchase money* of said lot, the same being a note bearing interest, etc. * * * a copy of which note is hereunto attached on the other side."

Harriet Smith was not properly a party to this mortgage; her signature to it is only an additional circumstance tending to confirm the truth of the recitals in the mortgage.

If a married woman is bound for debts created for the benefit of her estate, *a fortiori* is she bound, or at least, is her estate bound for a debt created in the acquisition of that estate.

DeLong, in reply:

Section 340, Civil Practice Act, Statutes 1864, says: "*All*

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persons, without exception, etc., may be witnesses in any action or proceeding, except as otherwise provided in this chapter," etc.

The only exception relating to married women being witnesses, is: "A husband shall not be a witness for or against his wife, *nor a wife a witness* for or against her husband," etc.

In this cause the husband not being a party to the action, clearly the wife was a competent witness.

But although this should not be so, still any matter is evidence which, being offered as such, is not objected to, and is admitted by the Court. It is worse than idle to answer this further.

According to the principles of the common law, this property was not the separate property of the wife. "A wife, during coverture, cannot acquire any property distinct from her husband." (*Comes v. Elling*, 3 Atk. 676; *Lamphiar v. Caerd*, 8 Vesey, 599.)

The legal existence and authority of the wife is, during coverture, merged in that of the husband. (2 Kent, 106.)

Husband and wife uniting in conveyance of wife's estate to a trustee, the husband has control of the issues or profits. (2 Grat. B. 280.)

Separate estate is only such estate as the wife holds, free from control of the husband. (4 Bouv. Inst. 272, Sec. 4000; 4 Barb. S. C. R. 407.)

This was not the separate property of the wife, because she was incapable of acquiring separate property. (4 Bouv. Inst. 273, Sec. 4002.)

A purchase of real estate by a *feme covert*, is voidable either by the husband, or by the wife, after she becomes a *feme sole*. (2 Kent, 134.) The evidence shows Smith disavowed this purchase.

Opinion by BEATTY, C. J., BROSNAN, J., concurring.

In the month of May, 1863, Harriet Smith, a *feme covert*, entered into a contract with the plaintiff for the purchase of a house and lot in Virginia City.

The transaction was consummated by a conveyance of the lot from the plaintiff to J. W. Grier, to be held in trust for Harriet Smith. At the same time, and as a part of the same transaction,

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Harriet Smith executed and delivered to plaintiff her promissory note for \$2,000, bearing interest from date at four per cent. per month, and due October 1st, 1864, as the price of the house and lot. As a part of the same transaction, a mortgage was executed and delivered to plaintiff. The mortgage commences with this recital: "This indenture, made the 15th day of May * * * between John W. Grier, trustee of Mrs. Harriet Smith, of * * * and Paul Mavrich," etc. Then follow the usual words of conveyance, description of property, etc., and then follows the following recital:

"This conveyance is intended as a mortgage to secure the payment of the sum of \$2,000, the purchase money of said lot, the same being a note bearing interest at four per centum per month," etc.

The mortgage is signed by Harriet Smith and John W. Grier.

For a while the interest was paid on the note. Afterwards the interest ceased to be paid, and the time of credit having expired, the plaintiff filed his bill to foreclose the mortgage. Grier and Harriet Smith alone were made defendants.

The defendants answer, and the only material facts they state in the answer are these: That at the time of the original transaction Harriet Smith was a married woman, and her husband was then living within the jurisdiction of the Court; that she was still a married woman, living with her husband within the jurisdiction of the Court, and always, since the beginning of the transaction, had been a married woman, so living with her husband within the jurisdiction of the Court. On the trial she proved satisfactorily that she was a married woman, and her husband was within the jurisdiction of the Court.

The Court, without making the husband a party, entered a decree for the sale of the mortgaged property. From this decree defendants appeal.

They make several points in the case which it appears to the Court scarcely require notice; yet, as they seem to be relied on in good faith, we will here dispose of them.

It is contended that the mortgage cannot be enforced because Mrs. Smith, as a married woman, could not bind herself either by note or mortgage. It is true Mrs. Smith could not make a valid

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and binding contract; her note was not an instrument upon which she could be sued in a court of law. The mortgage does not purport to be her deed. Her signature to it is mere surplusage. The deed was made to Grier, and he executed at the same time a mortgage to secure the purchase money. This he had a right to do, and the property was thereby bound, and not the less so because Mrs. Smith had made a void note. He describes himself therein as the trustee of Mrs. Smith, which was proper and right enough, but we cannot see that the mortgage would have been less valid if he had not so described himself. He took the legal title from the plaintiff, and he had the power to mortgage that title to secure the purchase price of the land. The interest of Mrs. Smith, as *cestui que trust*, was subordinate to the mortgage.

We hardly suppose that counsel is serious in his objection that Grier could not act as trustee of Mrs. Smith, because he had not been appointed as such by any lawful authority. We know of no other authority necessary to make a man a trustee for another than the will of a grantor who executes the deed of trust, and of the grantee who accepts it. The objection to the nonjoinder of parties is more serious. It seems to be well settled that in a bill to foreclose a mortgage against a trustee, the *cestui que trust*, as the party beneficially interested, must be made a party. (See Story's Equity Pleadings, Secs. 207 and 209, and cases there cited.)

Mrs. Smith, then, although not properly a party to the mortgage, was a *necessary* defendant. When a married woman is a *necessary* defendant, it seems equally clear that the husband should also be a party to the suit, and joined with her; unless, indeed, when his interests are adverse, in which case he might be a plaintiff.

It is true that it has sometimes been contended that where the wife's interest is entirely distinct from that of her husband, and the litigation is about her separate property, that the husband need not be joined. But all the cases cited in support of this doctrine seem to be cases where the husband was without the jurisdiction of the Court, or there was a deed of separate maintenance between the parties, or some other special reason for it. When there is no difficulty in bringing the husband in, we think the Court should not

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proceed to a decree before he is brought into Court. (See Story's Equity Pleadings, Secs. 61 and 63.)

The judgment of the Court below is therefore reversed, and the cause remanded.

The Court below will cause the husband of Mrs. Smith to be made a party defendant, and upon his answering or suffering default, will proceed to enter the proper decree in the case.

As the defense in this case seems to be frivolous, and merely for delay, and the error on which the case is reversed merely technical, we will not allow costs to the appellant; but the costs in this Court shall abide the final result of the suit in the Court below.

Upon petition for rehearing or modification of the judgment in the foregoing case, the following order was made:

Opinion by LEWIS, J., BEATTY, C. J., concurring.

In reversing the judgment of the Court below in this cause, it was ordered that the costs on appeal should abide the final determination of the action. Upon this, the appellant petitions for a rehearing, or a modification of our order in this respect. We are satisfied, upon reflection, that the appellant should recover his costs upon this appeal, and that our first conclusion was incorrect. The judgment of this Court must therefore be so modified as to allow the appellant his costs upon this appeal.

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COMMON COUNCIL OF THE CITY OF VIRGINIA,
RESPONDENTS.**

Where a case is tried by a Judge without the intervention of a jury, and there is an evident error in the calculations of the Judge, upon his own theory of the case, this would entitle the appellant against whom the mistake is made, either to a renewal or modification of the judgment. When this Court cannot see clearly what the judgment should have been, the case will be reversed.

An attorney who is authorized by a city council to bring a suit for the benefit of the city, has authority to direct a Sheriff to serve the summons in such case, and may bind the city to pay for such service.

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Where one person (John Doe, an unknown owner) is sued as the owner of a large number of lots which are delinquent for taxes, and the suit is also *in rem* against the lots, only one copy of the summons should be posted at the court-house door to give notice to John Doe, and one copy posted on each of the lots to support the proceeding *in rem*.

The Sheriff being directed to follow the direction of the Revenue Law, could only charge for one copy of summons for John Doe, and one for each lot served.

Mileage should only be charged for the necessary distance traveled to reach each lot, supposing the officer to start from the court-house—travel to first lot, then to second, and so on to the end of the day.

The law only requires three notices of sale to be posted, and no more could be charged for.

A direction by the attorney of the city to the Sheriff to follow the General Revenue Law, in making service of summons, and notice of sale, did not justify the Sheriff in following the custom of other officers who had been in the habit of performing unnecessary services in order to extort illegal fees.

Where the law clearly points out to an officer the mode of service, we will not believe, on ambiguous and uncertain testimony, that the attorney of the city gave him directions to serve summons, notices, etc., in such manner as could have answered no other purpose than to run up an extortionate bill against the city. If such absurd directions were given, it would be for the Court or jury to determine whether they were, or not, the result of a fraudulent combination against the city.

Quere?—If the Sheriff undertook to perform these services under the provisions of the General Revenue Law, which provides that the Sheriff shall when performing such services for the State, receive no fees except in those cases where they are collected from the defendants, is he not bound by this same condition when performing services for the city?

There was no law authorizing the city to bid in the lots offered for sale under this judgment; she derived no advantage from such pretended purchase, and the Sheriff acquired no new rights thereby. Had the lots been actually sold, and the illegal fees charged by the Sheriff actually come into the city treasury, the city might have been estopped to deny the Sheriff's rights.

Per BROSNAN.—The property against which proceedings in this case were instituted, was purchased in, by, and for the city. The city afterwards resold, at least a part of this property. Certainly, as far as it received a benefit from the services of the Sheriff, it must pay for the same.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD RISING, presiding.

To make the points taken by appellants' counsel more intelligible, we extract from their brief the following statement of facts. This extract, together with the statement of facts contained in the opin-

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ion of the Court, will fully show the points decided, and the nature of the errors complained of:

"The history of this District Court suit is briefly as follows: On the twenty-ninth day of April, A.D. 1864, the City of Virginia caused this action to be commenced, entitled "*The Mayor and Common Council of the City of Virginia v. John Doe, unknown owners, and some three hundred lots,*" as defendants, for the purpose of collecting the delinquent taxes due on said lots for the year 1863."

"Such proceedings were thereupon had, that on the twenty-ninth of June, 1864, judgment was recovered against the said lots, and they were decreed to be sold in due form of law to satisfy the amount of the judgments and costs against each."

Subsequent to this judgment, to wit: on the twenty-second day of July, 1864, the City of Virginia, by its Board of Common Council, adopted a resolution authorizing Mr. Brannon, one of their number, to bid in the lots for the city when sold, for the amounts severally due thereon.

"On the sixth day of August, an order of sale based upon the foregoing judgment was issued, and on the first day of September following, one hundred and ninety-three lots were sold and bid in by Mr. Brannon for the city, for the total sum of \$8,572.96, or in other words, for the sum of \$2,434.07, the amount of judgment, and the sum of \$6,138.89, Sheriff's costs and expenses of sale."

"Certificates of sale were duly issued to the city, and duplicates filed in the Recorder's office, as required by law."

"Some time after this, during the latter part of the year 1864, or beginning of 1865, Sheriff Howard's bill for his official services in the foregoing suit was presented to the Common Council, and after some considerable delay and negotiation was finally agreed to by the Board, they offering to pay it in city scrip, and he declining, because he had made some \$1,500 advance in gold coin, and wished reimbursement to that extent in kind."

"During the months of March and April, 1865, the city, then claiming to have succeeded to the title of those lots so purchased through Mr. Brannon, proceeded to resell them, and to effect that object passed Ordinances Nos. 123 and 124."

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“Sales under these ordinances to some extent were actually had, and deeds subsequently made in pursuance of them to the purchasers from the city.”

Wallace & Gordon, for Appellants.

The city was estopped by its bid for the lots. Having purchased the lots at the amount of the judgment, including costs, it is no longer in a condition to inquire whether those costs were right or wrong. The city stands just as if the lots had been bought by others, and the amount of Sheriff's costs paid into the city treasury. The city would be bound as having received so much money to the use of the Sheriff, and would have no right to inquire whether the Sheriff came fairly by the money or not.

If we are not right as to the estoppel, taking the items as they are presented in the bill of items, \$1,440 for serving 720 copies of summonses should not have been rejected. The necessity of the suit in the form in which it was brought, and the authority for bringing it in that form, are to be found in Ordinance 66 of the City Council.

It was essentially a proceeding *in rem*, and each lot had to be served. (*People v. Rains et al.*, No. 2, 23 Cal. 134.)

The city could prescribe no form of action or proceeding different from that prescribed for collecting the general revenue of the territory.

The Sheriff having had summons placed in his hands with direction to serve in a certain way, was bound to follow those directions unless they were in violation of some particular law.

The City Attorney was the proper law officer of the city, and any instructions he gave the Sheriff were binding on him, and also bound the city. The fact that the city was an incorporation did not render it less liable to be bound by the acts of its attorney than an individual would be by his attorney. (See the *Gas Co. v. San Francisco*, 9 Cal. 466; and *De Goof v. American Company*, 21 N. Y. 126.)

The Sheriff was entitled to the whole amount charged for copying summons.

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The summons was in the usual printed form, without blanks large enough to contain all the description of lots, etc., as required in this case. Instead of filling up one of these blanks in the usual way, it referred to the complaint as being attached to and being part of the summons.

As the complaint formed a part of the summons, by this reference the Sheriff could not copy a summons without copying the complaint. If this made an unusual and unnecessary amount of writing in each copy, it was not the fault of the Sheriff. The summons would have been incomplete without some part, at least, of the complaint.

It was not the business of the Sheriff to fish out the material parts. He must take it as it came to him from the Clerk's office.

The charge for making and posting notices of sale should have been allowed, because it was done under the special direction of the City Attorney.

The testimony in the case did not justify the reduction made by the Court on the bill paid for printing.

The charge for filing certificates of purchase should have been allowed.

The law requires the Sheriff to file these certificates, but fixes no fee for the performance of the duty. Therefore, he should have been allowed a reasonable fee.

Will Campbell, for Respondent.

This was an action of assumpsit, with two counts. One for official services performed for the city by the Sheriff; the other, for money laid out and expended for the city.

The doctrine of estoppel does not apply to this case. Under the first count the Sheriff or his assignee could not recover for services never performed, nor at a higher rate than allowed by the Fee Bill of 1861. It is hardly contended that the Court did not allow him for all the official services really performed, and as high as the law regulating fees allows.

The allowance under the second count is as great as the evidence in the case justified.

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Opinion by BEATTY, C. J., LEWIS, J., concurring.

This was an action brought by the plaintiffs as assignees of Wm. H. Howard, late Sheriff of Storey County, against the respondents, for official services rendered by the late Sheriff to the corporation of the City of Virginia.

The action was for \$8,688.60, a part of that sum being for services and expenditures in the Probate Court, and the balance of the demand for services, etc., in a tax suit in the District Court.

A bill of particulars was demanded by defendants, and one was filed as required. The bill of particulars which we find in the transcript contains the items of charges for the services both in the Probate Court and District Court.

The Judge below, in making up his finding of facts, takes the bill of particulars as a basis. From this bill of particulars he deducts certain items and portions of items as improperly charged to defendants.

These deductions amount in the aggregate, as footed up in the transcript, to \$5,951.65. There is, however, a mistake in carrying out the Judge's figures in one line to the amount of \$20.

The true deduction, on the Judge's theory, should have been \$5,971.65. But this \$20 will not in any way affect the judgment in this Court. We will therefore adhere to the figures of the transcript, and say the deduction made from the bill of particulars was \$5,951.65. The Judge then finds that while the complaint is for \$8,688.60, the bill of particulars, after deducting the credits therein contained, is for only \$7,273.60, showing a discrepancy between the complaint and bill of particulars of \$1,415. He then adds this \$1,415 to the amount of deductions made, (say \$5,951.65) which makes a total of \$7,366.65. This latter sum he deducts from the amount claimed in the complaint, and renders judgment for the balance in favor of the plaintiffs. That judgment was for \$1,321.95. From this judgment plaintiffs appeal. This deduction of \$1,415 for the discrepancy between the sum claimed in the complaint and the footing up of items in the bill of particulars, is evidently a mistake. The bill of particulars foots up on the debit side \$8,042.90. From this amount is to be deducted a credit of \$113,

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leaving the actual amount claimed in the bill of particulars \$7,929.90, or \$656.30 more than the Court below estimated.

If we deduct from this the clerical error of \$20 made on the other side, still the judgment for plaintiffs is less by \$636.30 than it should be on the theory of the Judge in whose Court it was rendered. This would entitle the appellants either to a reversal or modification of the judgment. As there are other matters at issue in this case, on which this Court is not able, from the confused statement of facts in the transcript, to arrive at a proper conclusion, we will reverse the judgment, and order a new trial.

But before sending back the case we will, as far as practicable, dispose of the points raised on this appeal. The bill of items in the transcript is for services in connection with several suits in favor of the city in the Probate Court, and one suit only in the District Court.

There seems to be no complaint as to the rulings of the Court below with respect to the costs in Probate Court. The only open question is, what should have been the costs allowed for services in the District Court suit. The facts in regard to this suit, so far as we can understand them, are as follows: Two hundred and seventy-eight lots in the City of Virginia, which were assessed to unknown owners, were delinquent for the taxes of the year 1863. The city Board of Aldermen passed an ordinance in regard to the collection of city taxes, the thirty-first section of which reads as follows:

“After the publication, as in the last section provided, it shall be the duty of the City Attorney to institute proceedings in any Court of competent jurisdiction to enforce the payment of taxes due the city, and in every case in which suits are so brought, if judgment be obtained, the Court in which such judgment is rendered shall tax, as City Attorney’s fees, twenty-five per cent. on the amount recovered, which shall be collected from the defendant, but in no event to be a charge against the city; and shall also tax the same fees to other officers as are allowed such officers for similar services in civil cases.”

Acting under this ordinance, the City Attorney brought suit against John Doe, the unknown owner, and the two hundred and seventy-eight lots. It seems however, that there was by mistake

one whole tier or range of lots included in this number which had no existence in the city. This reduced the number of delinquent lots, but to what extent is not clearly shown by the transcript. The statements of the Deputy Sheriff, who made the service, are not intelligible on this point. But the judgment was against two hundred and forty lots, and this was probably the true number of delinquent lots on which service was made, or attempted to be made. It is true, the Judge in his findings says that service was made by posting on two hundred and fifty-eight of the lots. But this is probably a mistake. The Under Sheriff, who kept the books of the office, charges for seven hundred and twenty copies of summons, complaint, etc., and he shows, if we understand his testimony, that there were three copies posted for each lot. This would make the number of lots served two hundred and forty, corresponding with the judgment.

The question for determination is, what compensation should be allowed the assignees of the Sheriff for services in connection with the suits against these lots.

It is contended on the part of the city that there was no law authorizing this suit *in rem* against the lots, and therefore the charges made by the Sheriff for service on the lots should be totally disregarded: that they are not legitimate charges, and cannot be maintained against the city.

The City Attorney brought the suit in this way. It was within the sphere of his duty to determine in what manner suit for delinquent taxes should be brought. Having brought the suits and directed the manner of service, we think it was the duty of the Sheriff to serve the summons, as directed by the City Attorney. In this particular we think the attorney properly represented the city.

The Under Sheriff asserts that the City Attorney directed him to pursue the General Revenue Law in serving summons in this case, and that he acted under that instruction.

We will examine now what the General Revenue Law requires, and what fees the Sheriff could charge for such services.

The General Revenue Law provides that where there is a suit *in rem* against the delinquent property, service shall be made by delivering a copy of the summons to parties in possession of that property,

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and posting a copy on the property. (See Section 40, Revenue Law 1862.)

It does not in such case provide for posting copies at the court-house or any other public place. In regard to the unknown defendant, John Doe, one copy of the summons might have been posted at the court-house door to give him notice. But there was no pretense for posting two or three hundred copies of the summons at the court-house door or any other public place.

Perhaps the best way to express our views as to this case will be to take the bill of particulars, item by item, and compare it with the Fee Bill.

The first charge in this bill is for serving 720 copies of summons; if the law had been followed, only 241 copies could be charged for—one for each lot, and one for John Doe.

Next for making 720 copies; this should have been for making 241 copies.

The next charge is \$359.50 for mileage; this is entirely extravagant. The mileage allowed by law is only forty cents a mile for going only to serve a summons. And if a number of summons could be served by the same travel, only one mileage can be charged. Here the most distant lot was only one mile, so if separate mileage was charged on each lot it would only amount to \$96. But as a number of lots might be reached by traveling not over one mile from the starting point at the court-house, perhaps not more than one-tenth of that amount should be charged. This must be a matter of proof. If a party could on an average reach ten lots in a mile's travel from the court-house, there should be allowed forty cents for each ten lots, and so in proportion, if the distance to be traveled should exceed or fall short of one mile for each ten lots, for the entire two hundred and forty.

There is a charge of \$1,240 for posting 620 notices of sale. The law required three such notices, and no more. There is nothing requiring a separate notice of sale to be posted for each separate piece of property.

Five hundred and sixty dollars is charged for advertising sale in newspaper. The law requires one notice to be published once a week for twenty days. The city would only be responsible for the reasonable

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price of such advertisement—say for three weekly insertions of such notice. The Court, in allowing \$75 for this item, probably allowed a liberal price. But this will be the subject of proof. There is no dispute about Sheriff's commissions.

The next charge is for making 386 certificates of sale. The Sheriff was only allowed here to charge for one certificate and a duplicate, say two copies in all. He charges \$193 for filing duplicates. He was entitled to just fifty cents for filing one duplicate. He should have been allowed to charge for stamps on one certificate only.

We have stated in the foregoing part of this opinion, what we thought to be the legitimate charges for services in a case where a suit was brought, under the General Revenue Law, against one unknown owner and a number of delinquent lots.

There are however behind this several other questions. The Under Sheriff states distinctly that the City Attorney directed them, at the Sheriff's office, to pursue the General Revenue Law in making service in this case. He then states that they did make service in the same manner as collectors did. In other words, if we understand him, other officers had been in the habit of serving three copies, when the law only required one; and if other officers had been in the habit of thus trebling the amount of fees the law allowed, the Sheriff might do the same. That the Sheriff would have been justified by many precedents in coming to such a conclusion, we are fully aware. But this Court is not yet prepared to hold that when one officer extorts illegal fees, all his successors will be justified in following the precedent.

The Under Sheriff also says that the City Attorney directed him to post copies on the court-house door, and in another public place in the city. These last statements, however, were made in response to leading interrogatories. Although asked several times about what were the directions of the City Attorney, he said nothing of this until led right up to that point by questions in the most objectionable form. We are charitably inclined to think the witness did not intend to say that the City Attorney gave instructions in this language; but merely that he instructed witness to serve as the General Revenue Law required in such cases; and the witness him-

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self concluded that the summons should be posted on the courthouse door and some other public place, because some other officer had pursued that course. Where there is no ambiguity in the law we cannot, without clear and satisfactory evidence, believe the City Attorney gave any such absurd instruction, which could have answered no other purpose but to run up an exorbitant bill against the city. If such instructions were given, (and we can but repeat that we think the thing highly improbable) there not being the slightest ambiguity in the law, it would then be a question for the jury or Court below to determine whether this was not evidence of fraud or combination to extort illegal fees from the city.

Again, if the Sheriff was directed to pursue the General Revenue Law, and he acted under that law, was there not an implied contract that he would be bound by the provisions of that law so far as his fees were concerned? Or in other words, could he legally collect fees from the city for services which the very law under which he was proceeding declares shall only be collected from the delinquents or property on which the taxes are delinquent? As this point has not yet been fairly presented in the case, and proof may be introduced as to what was the understanding on this point, we will not now attempt to determine it. The law did not require the Sheriff to make any such services, and if the City Attorney required such to be made, the Sheriff might have refused without the payment of his fees in advance. Or he might have made the service, trusting to the promise of the City Attorney that his fees should be paid by the city at some future time; or he might have made them, trusting to his ability to collect from the delinquents.

The appellant contends the city was estopped from denying the validity of this claim, because after judgment the City Council authorized some person to bid in these lots at the Sheriff's sale for the benefit of the city. That those bids were for the amount of the taxes due on each lot, and its proportionate share of the costs. That the city having thus had the benefit of these over-charges, cannot now say they were not legitimately a part of the judgment.

Had these lots been actually sold and the money for costs paid into the city treasury, perhaps there would have been some force

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in this position. But the lots were not sold. The city derived no benefit from the illegal costs thus added to the taxes.

Besides, there was no law or authority allowing the city corporation to buy city lots sold for taxes, that we are aware of. That part of the proceeding was utterly void and without any authority. No rights were thereby conferred on the Sheriff that he did not before possess.

Judgment reversed, and a new trial granted.

Separate opinion by BROSNAN, J.

I concur in the judgment of reversal and order granting a new trial in this case; and as the action is to be retried, I consider it a duty to state that a well established rule or principle of law involved in this case, in my opinion, has not received due consideration, if it has not been entirely overlooked on the former trial.

The suit in the District Court referred to was instituted by the City Attorney under the direction and authorization by ordinance of the corporate authorities. The property of delinquents was sold under and by virtue of an execution issued upon the judgment recovered in that action, and was purchased at such sale by and for the city. The city authorities assuming that the title to the lots vested in the corporation under the execution sale, afterwards by ordinance advertised for sale and sold several parcels of the land designated, together with the improvements on them, as "belonging to the City of Virginia."

This ordinance, among other things, provides that twenty per cent. of the purchase money should be paid at the time of sale, to be forfeited to the city in the event of the purchaser failing to pay the residue to the Mayor of the city within five days. It also provided that the Mayor should execute and deliver deeds of the city's interest to the purchasers—the conveyances to be drawn by the City Attorney; and that the Mayor, after deducting the costs and expenses of advertising and selling, should pay over the residue of the money realized to the City Treasurer.

It further appears from the record, as stated under oath by the City Attorney, that he prepared conveyances of lots sold at such last mentioned sale, as directed by the city authorities.

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On this point his testimony reads as follows :

"I prepared several of them [of the deeds] ; they were signed by the Mayor, witnessed by myself, and delivered to the purchasers. The lots sold by the city were part of those sued for delinquent taxes in the District Court suit"—the suit referred to in the complaint.

What number of lots were thus disposed of, or what amount of money, if any, was realized from forfeitures, or realized from such sales by the city, does not appear from this strange record.

It is however evident therefrom, that the city derived some benefit from the services of Sheriff Howard, for which he was legally entitled to receive a reasonable compensation.

Now, discarding from consideration for the present the question whether the corporation had any right or power to sell or purchase the property designated, and without inquiring how far it may be equitably estopped from repudiating the acts of its chosen and appointed agents under the circumstances of this case, it answers my purpose to state, as matter of law, that a municipal corporation cannot receive to its use the labor or the property of a party and shield itself from responsibility.

Like a private individual, it becomes liable by implication. The law implies a promise to pay in such cases. No principle is better established than this by the authorities. (8 Pick. 177 ; 9 Cal. 453 ; 3 Levy & Rawle, 117 ; 14 Pa. State Rep. 81.)

How far any part of this case may be brought within the operation of this rule upon another trial, I cannot determine. This is properly the province of plaintiff's legal advisers.

STATE OF NEVADA, RESPONDENT, v. THOS. McNAMARA,
APPELLANT.

The eighth section of "An Act concerning Juries," approved March 3d, 1866, provides that when, during the term of a Court, the services of a grand jury are required, and there is no existing grand jury or there is a lack of sufficient numbers to form such a body, other grand jurors may be selected *in the same manner* as is provided for the selection of petit jurors in section six of

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the same Act. Section six provides for the selection of jurors by the *Judge* and the *County Assessor or Clerk*. The selection of grand jurors during a term of the Court must be by the same officers, or it will not be a legal grand jury.

An indictment found by a grand jury not legally selected, is invalid.

When a juror was selected and placed on the jury list, and summoned to attend as a juror under the name of E. Barry, but whose true name was E. Berry, or Edward Berry; the variance in the name would be immaterial, if it satisfactorily appeared that the person attending as a juror was the one really selected.

But, *quere?*—Was the statement of the Judge to this effect sufficient evidence of the fact? Should there not have been the affidavit of at least one of the officers who selected the juror to this effect?

When two parties are jointly indicted, but are tried separately, the acts and declarations of one cannot be given in evidence against the other, until some complicity has been shown between the two. And where such evidence was given, the defendant on trial was entitled to an instruction in the following language:

"In considering this cause the jury must discard and disregard the conduct and sayings of O'Neil, unless the evidence shows beyond a reasonable doubt that the defendant had previously conspired to inflict an injury on the deceased, or to commit a public offense in the prosecution of which the deceased was slain."

When a Court approves an instruction asked, and intends to give it, but by some oversight neglects so to do, it is just as injurious to defendant as if positively refused; and if the instruction is important, entitles the defendant to a new trial.

Under our statute it is not necessary that the defendant should except to the action of the Court, in failing to give an instruction asked for.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD RISING, presiding.

The facts of the case are stated in the opinion.

Williams & Bizler, for Appellant.

The jury were not selected according to the provisions of the statute. The proper challenge was to the panel. (*Stone v. People*, 2 Scammon, 326.) Defendant was entitled to have the formalities of the law complied with in drawing the jury. *People v. Coffman*, 24 Cal. 234.)

The record must show the jury was legally selected. (*The State v. Conra*, 3 Blackford, 325.) A grand jury, not lawfully drawn, cannot prefer an indictment. (——— v. *The State*, 24 Miss. 621.) It must be summoned by the person designated by law.

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(5 Mass. 434.) Our statute clearly indicates the insufficiency of an indictment found by a grand jury, not selected by the proper officers. (See Stat. of 1861, p. 454, Sec. 179, and p. 464, Sec. 276.)

The Court having erred on this point, the law presumes it to be to the injury of the defendant.

The Court erred in suffering *E. Berry* to sit on the jury. No such person was selected as a juror; no such name was placed on the list. Berry not having been selected as a juror, he was a mere interloper. That a summons issued for E. Barry was served on him, no more entitled E. Berry to appear, than it would have entitled John Jones to appear as a juror.

When one not summoned as a juror appeared and was sworn in the name of one for whom a summons had been issued, a *venire de novo* was awarded. (1 Eng. Common Law, 705; 6 Taunton, 460. See Graham & Waterman on New Trials.)

The Court erred in admitting testimony in regard to the acts and declarations of O'Neil, and in not giving the instruction asked in relation to that testimony.

R. M. Clarke, Attorney General, for Respondent.

The objection that the grand jury was not regularly drawn, is not well taken. (*People v. Roderiguez*, 10 Cal. 59; *People v. Cuintano*, 15 Cal. 329; *People v. Moice*, 15 Cal. 331.)

There was no valid objection to the juror Berry. In this case it is evident the right person, the person really selected, served as a juror. There was no mistake about the person—there was merely a mistake about the spelling of the juror's name.

The record shows that a certain instruction was not read to the jury. The law allows the jury to carry all instructions given to their room. In the absence of any exception on the part of defendant, stating the facts, this Court will not presume that this instruction, which was not read merely by an oversight, was withheld from the jury on their retirement, but will rather presume they carried the instruction with them. If they had the instruction in their room, the omission to read it by the Judge was immaterial.

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Error must affirmatively appear. Every intendment is in favor of the Court below. (5 Cal. 151 and 321.)

Opinion by BROSNAN, J., BEATTY, C. J., concurring.

At the January Term, A.D. 1867, of the District Court of the First Judicial District, held in Storey County, McNamara, together with one O'Neil, were jointly indicted for the crime of murder, O'Neil having been charged as an accessory. McNamara was allowed a separate trial; was tried at said term of the Court; found guilty of murder in the second degree, and judicially sentenced to imprisonment in the State Prison for a term of thirteen years. After having made a motion for a new trial, and also in arrest of judgment, both of which were overruled, the defendant appealed to this Court from the judgment of the District Court.

The first point to compass a reversal of the judgment made by appellant's counsel is, that the grand jury which found the indictment had not been selected pursuant to the requirements of the "Act concerning Jurors," approved March 3d, 1866, inasmuch as the jury was selected by the District Judge and one of the County Commissioners, whereas it could be legally selected only by the Judge and the County Assessor or County Clerk. Before the jurors were sworn, the defendant being present in Court to exercise his right of challenge, a motion was made by the prisoner's counsel to set aside the panel for the irregularity referred to as regards the mode adopted in selecting the jurors. The Court denied this application, and an exception to this ruling was duly taken on the part of the defendant. Thereupon, the counsel challenged the individual jurors; which challenge was also overruled, and an exception was taken.

In order to reach a clear understanding of the materiality and force of the objection, it seems pertinent to state the facts upon which the objection is based, and the law by which its availability must be adjudged.

It appears by the record, and the fact is conceded, that for some cause a grand jury had not been summoned or drawn previous to the commencement of the aforesaid January Term of the Court, as required by statute. (Laws of 1866, 192, Sec. 7.) This sec-

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tion makes it the duty of the District Judge and any one of the County Commissioners to select a grand jury at least ten days prior to the assembling of the Court, and points out and directs the mode and machinery whereby the grand inquest shall be selected and constituted. But in the event of a failure from any cause to organize a grand jury as provided in the last-mentioned section of the Act, the Legislature, out of abundance of caution and to meet any emergency or necessity that might arise, and in order that the demands of justice may not be retarded, provided in the following section (Sec. 8) of the statute that a new grand jury "shall be selected and summoned in the same manner as is provided in section six of this Act for the selection of trial jurors."

The grand jury in the case under advisement was selected in virtue of the authority and power granted under the eighth section. We are constrained by the express and unambiguous language of this section to interpret its meaning, in connection with section six, to which it immediately and explicitly refers as to the mode of selecting a jury, under the circumstances which characterize the present case. It may well be, in fact, that the Legislature intended the selection to be made by the Judge and one of the County Commissioners, as in section seven, and that the designation of the Judge and County Assessor or Clerk as the proper officers for the selection of the jury, as in section six, was an inadvertence on the part of the Legislature. So on the other side, it may be reasonably urged that the law-makers intended precisely what their words import, (this is a primary rule of construction) for the reason that, in cases of character and accompaniments like this case, where dispatch is required in order that the business of the Courts may not be suspended or delayed, the aid of the County Assessor or Clerk was enlisted, as being more immediately approachable than that of a County Commissioner, who is not obliged to reside at the county seat, where the Courts are required to be held.

However that may be, we are not at liberty to speculate as regards probabilities, where the language of the law is so clear and unambiguous as in the case before us.

The Legislature must be intended to mean what they have expressed in plain terms. Whenever they have done so, there remains

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no room for construction by Courts. (*Brown v. Davis*, 1 Nevada State Reports, 409, and cases cited.)

Having proceeded thus far, it becomes imperative to direct attention to the sixth section of the statute. This section makes provision for the selection of a trial jury during the term, whenever it appears to the satisfaction of the Judge that any of the occasions designated in the section has occurred. In such event, it makes it "lawful for such District Judge and the County Assessor or Clerk to select alternately from the body of the county the names of a sufficient number of persons lawfully qualified to serve as trial jurors," etc. (Laws of 1866, 192, Sec. 6.)

But as we already stated in this case, the provision for selecting the jury by the Judge and the County Assessor or County Clerk was clearly neglected. This was a manifest departure from the requirement of the law, and if it can be justified, a jury may be selected by the Judge and any other officer or individual not designated by law.

The Legislature seems to have taken particular care to secure fair and impartial jury trials; but if the doctrine contended for on the part of the prosecution be established or tolerated, all the law on the subject of selecting juries becomes nugatory—a dead letter. The prisoner was about to be tried for a crime involving his life. Upon an issue of such moment he was entitled to demand the observance of all the formalities of law. It is his constitutional privilege to stand upon his strict legal rights, and he is entitled to a trial conducted in accordance with the legal formula prescribed.

An indictment found by a jury not legally constituted cannot be valid. Indeed, the ground of error alleged is made by statute, one of the causes for which an indictment will be set aside. (Laws of 1861, 454, Sections 178, 179; *Id.* 464, Section 276.)

A jury must be summoned by the officer designated by law, and no other person or officer can legally discharge that duty. (5 Mass. 434, 435.) Is it not equally if not more necessary that the jury should be *selected* by the officers whom the law invests with the power of exercising that function? In the case of the *People vs. Coffman* (24 Cal. 234) the Supreme Court of that State employ the following language on this subject:

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“ The defendant is entitled to have all the formalities observed that are prescribed by law for the summoning, drawing and impanneling of the jury, and if any omission or irregularity in that respect occurs, he is entitled to have the same corrected, and if not so corrected upon its being pointed out by the defendant, it is error,” etc.

Our attention has been called to some California decisions to show that the objection in this case was not well taken. *People vs. Roderiguez*, 10 Cal. 59, is one of them. That case has not the most remote application to this.

The objection to the panel in that case was that the jury had not been selected before the term of the Court commenced.

The jury was selected during term, which the law authorized ; and was selected in exact conformity with the statute.

In the *People vs. Cuintano* (15 Cal. 327) the objection was the same as that in the last mentioned case. The Court say : “ We see nothing in the facts of this case to distinguish it from that of the *People vs. Roderiguez* (10 Cal. 50).” In the other case cited, *People vs. Moice*, the challenge was not made in the Court of Sessions, in which Court the indictment was found, notwithstanding the prisoner was present and might have interposed the objection.

The Court merely hold that it was too late to raise the question in the District Court, where the cause was sent for trial. There is nothing in these decisions that conflicts in the slightest degree with the views we have herein expressed.

Another ground of error assigned is that one of the jurors, by name Edward Berry, had not been summoned or drawn by that name, but that *E. Barry* had been drawn. Berry in fact was the person summoned, and we are not informed by the record that any individual bearing the *cognomen* Barry, was at the time physically resident within the county where the venue is laid, so as to be subject to the process of the Court.

But connected with the challenge to this juror, the record discloses the fact that Barry was the surname contained in the original certificate of selection made by the Judge and Clerk ; and also in the venire, summons and ballot drawn. With a view of obviating this apparent inconsistency, the Judge, subject however to

the objection of the defendant's counsel, made an oral statement to the effect that *Berry* was really the person selected and summoned.

The objection to the statement so made is that it was not the best evidence of the identity of the individual selected. This aspect of the question creates the only embarrassment we meet in disposing of the materiality of the objection. We are not prepared to adjudge that it is altogether without force. We rather incline to the belief that the affidavit, at least, of the Clerk, or even of the Judge, should have been resorted to and embodied in the record. Be that however as it may, we are unable to perceive how this variance in the *name*, standing alone, could have prejudiced the defendant. But as our decision will be governed by other points presented, we see no necessity for definitively passing upon the admissibility or competency of the Judge's explanatory verbal statement.

It is further urged in behalf of the appellant that the Court erred in admitting evidence of the acts and declarations of O'Neil, and for not reading instruction number one to the jury. Up to the time when this testimony was offered, the record does not disclose a scintilla of proof of any connection or concert of action between O'Neil and McNamara. The record is equally silent throughout as to how the two happened to be together in the house where the difficulty took place—whether they came or left together. There is a total absence of evidence also of any assent or approval on the part of McNamara of anything said or done by O'Neil at the time. The Court admitted the evidence notwithstanding the defendant's objection. On this point, one witness testified that O'Neil had a difficulty with another man. It does not appear who that person was, whether the deceased or some other party. That at the time or a little before this difficulty, O'Neil had a pistol; that he threw his coat off, and delivered the pistol to the witness and told him to take care of it. He (O'Neil) said: "Take hold of this pistol while I settle the difficulty with that man in the room." The witness was then asked by the prosecuting attorney: "Where was McNamara at that time; and how far from O'Neil?" He answered: "At the corner table taking beer, perhaps fifteen or eighteen feet across." The witness also stated that O'Neil had the

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man (still not named or identified, that we can discover) on the ground, and kicked him a couple of times. That O'Neil then came to witness and demanded the pistol, which witness returned; that he flourished it about and said: "I am on the fight, shoot or cut any way you have a mind to take me."

Another witness, a policeman, testified under the like objection by defendant's counsel, that about an hour before the killing of Eckert, O'Neil drew a pistol in the house where the affray took place, (McNamara being present at the time) and said he could shoot as fast as anybody; that witness said to O'Neil he would lock him up if he did not put up the pistol. He put up the pistol, and said he did not mean anything by it.

With the view of counteracting any effect O'Neil's conduct and declarations might have as against the defendant, his counsel requested the Judge to give the following instruction to the jury: "In considering this cause the jury must discard and disregard the conduct and sayings of O'Neil, unless the evidence shows beyond a reasonable doubt that the defendant had previously conspired to inflict an injury on the deceased, or to commit a public offense, in the prosecution of which the deceased was slain."

The Court, it appears, approved of the instruction, and intended to have given it to the jury. The Judge had marked it on the margin "given," and his statement appearing in the record is that it "was intended to have been given by the Court, and it was marked 'given,' but unintentionally omitted reading the same to the jury."

We have no hesitation in declaring, after a careful examination of the facts disclosed by the record of this case, that the foregoing instruction was eminently proper, and should have been given in the charge to the jury. And it is apparent that the Court below so understood and intended to give it, but through an oversight failed to do so. The defendant was not only entitled to have it read to the jury, but had a legal right to have it placed in their hands for inspection and perusal when they had retired for consultation and deliberation in relation to their verdict. (Criminal Practice Act, Secs. 387, 393.)

Even had this instruction been before substantially given by the Court in its charge, which is not the fact, still it should have been

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given, or else the fact of its having been already given should have been communicated by the Court to the jury as the reason for its refusal. (*People v. Bonds*, 1 Nev. 33.)

It is contended by the learned counsel for the people, that no exception has been taken, nor has the omission been assigned as ground of error in the District Court, and consequently it comes too late in this Court. We cannot agree to this proposition. The defendant had a clear right to have the instruction given. If refused, he was not required to take any exception. (*Vide* Sec. 426, Crim. Pr. Act.) The defendant or his counsel may not, indeed could not, well know that it had not been refused. Had it in fact been refused, it would have been an error most assuredly. In what respect does the effect of omitting to give an instruction that should have been given, materially differ from the effect consequent upon an absolute refusal? To the prisoner they are precisely the same. And thus, while neither himself nor his counsel is chargeable with any negligence, his life is jeopardized through an unintentional oversight of the Judge, if the argument of the counsel for the State be well founded. The law does not countenance such absurd conclusions. Had the instruction been given, the trial might have eventuated in a different result. This is probable, and is sufficient for this Court to know.

We have, therefore, come to the conclusion that, upon both the first and third grounds of error assigned, the judgment should be reversed, and a trial *de novo* had.

It is accordingly so ordered.

W. C. GRIMES, APPELLANT, *vs.* WALLACE GOODELL,
RESPONDENT.

Under the Revenue Act of this State, *held*, that the Auditor, Assessor and Tax Collector are preferred creditors, and entitled to their pay for assessing and collecting the taxes, before the money collected is distributed among the several funds to which it properly belongs.

APPEAL from the District Court of the Fifth Judicial District,
Hon. S. L. BAKER, presiding.

Grimes v. Goodell.

The facts appear in the opinion of the Court.

Williams & Bizler, for Appellant.

Robert M. Clarke, for Respondent.

Opinion by BEATTY, C. J., BROSNAN, J., concurring.

This was an application for a mandamus. Grimes was formerly Auditor of Churchill County, and claimed that his fees and salary as such Auditor should be paid out of the money collected for taxes in his county, in preference to warrants drawn on the General Fund of the county, which were of older date. The Treasurer refused so to pay, and Grimes applied to the District Court for a mandamus. That application was denied, and he appeals to this Court. Section 86 of the Revenue Act of 1864-5, amended in 1866, provides that the Auditor shall receive certain compensation, to be allowed by the Board of County Commissioners for folio work, and also a fixed monthly salary. Section 87 provides that the amount paid the Auditor for services under this Act shall be apportioned between the State and County in proportion to the tax assessed by each.

It seems, from this section, to have been the intention of the Legislature to apportion the payment, both of the folio work and the monthly salary, between the county and the State. Sections 77 and 78 of the Revenue Act read as follows:

77. "Each County Treasurer shall at the same time of making a settlement produce to the Controller of State the certified statement of the County Auditor of the amount allowed and paid to the Assessor and the County Auditor for the assessing and collecting of State revenue as prescribed by this Act; and no County Treasurer shall be allowed to make any settlement with the Controller of State, or in any manner release him or his bondsmen from liability for the full amount by him received, unless he produces to the Controller the statements required by this section."

78. "Whenever any allowance is made to any Assessor or Auditor as in this Act provided, the Clerk of the Board of County Commissioners shall certify the account so allowed to the Auditor, who

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shall draw his warrant on the County Treasurer for that part of the same which the county is required to pay, which shall be in proportion to the taxes levied for State and county purposes respectively; and the Auditor shall make a certified copy of the account, and indorse on the accounts remaining in his office the same; and shall furnish such copy with the indorsement thereon to the County Treasurer, who shall pay out of the moneys belonging to the State and county respectively the amounts indorsed on such accounts, to the Assessor and Auditor, and take his receipt therefor thereon. And the Treasurer on making his semi-annual statement shall present with the Auditor's statement such copy of the account allowed by the Board to the Assessor and Auditor, indorsed and receipted as herein provided, and the Auditor shall allow him for the amounts so paid."

The language of Section 78 shows clearly that the County Treasurer is to pay the State's portion of the Auditor's compensation before it goes out of his hands. It also seems to contemplate that both the State's portion and that payable by the county shall be paid at the same time.

The last sentence in Section 78 shows, too, that the County Treasurer, at each semi-annual settlement, is to produce the receipt of the Auditor for his claim. Now, if the Auditor was merely to receive a warrant on the Treasury, payable in due course according to its date, it is evident that the Treasurer could not or ought not to obtain his receipt for money not paid. When a party obtains a warrant on the Treasury it might be very proper to give a receipt to the Auditor for the warrant. But certainly no receipt should be given to the Treasurer before the payment of the money on the warrant. It seems to have been the intention of the Legislature to pay the Auditor, Assessor and Tax Collector for their services in collecting the revenue before a distribution of the proceeds of the taxes into their respective funds in the State and county treasuries. We are of the opinion the Treasurer should have paid the amount of the Auditor's claim before otherwise disposing of the county's share of the taxes collected.

From the rather imperfect record before us, it is not in our power to say what the Treasurer has done with the money out of which

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the Auditor's claim should have been paid. Probably it has been paid into the General County Fund. If so, the Auditor should be paid out of that fund, and the Treasurer will then be entitled to the amount thus paid as a credit in the next semi-annual settlement.

The order of the Court below refusing the mandamus, is reversed. That Court will issue its mandamus in accordance with the opinion in this case.

PRESCOTT & BOOTH, APPELLANTS, v. WELLS, FARGO & CO., RESPONDENTS.

Fixture has several distinct meanings. Sometimes it means anything which is by artificial means affixed permanently to the soil. Sometimes it is used to designate something which is substantially affixed to the soil, but which may nevertheless be lawfully detached therefrom by one who has so affixed it without the consent of the owner of the soil. In this opinion the word will be used in the latter and more restricted sense.

It has often been held that fixtures were personal property, and might be recovered in trover.

Pans furnished to a mill owner upon his agreement to pay rent therefor, and by him and the manufacturer attached to the mill and machinery of the same, are fixtures.

If the owner of the mill should sell the mill with the fixtures, this would (under the authorities holding such fixtures to be personal property) amount to a conversion, and he might immediately be sued for such conversion; so the purchaser after demand made of him, and refusal to surrender the fixtures, might likewise be sued in trover and recovery had.

Fixtures, although capable of being lawfully converted into personal property without the consent of the owner of the soil, are in their nature a part of the realty, and should be held and treated as such until actually severed from the freehold.—Per BEATTY, C. J.

Trover will not lie for a fixture.—Per BEATTY, C. J.

The pleading in this case is good as an action upon contract.—Per BEATTY, C. J.

The breach in this case is not exactly in the language of the contract, but seems to be substantially correct. That breach is not denied in the answer.

There was no necessity of alleging the value of the fixtures. The plaintiffs only had to allege the extent of the damage they sustained in consequence of not being permitted to remove the same.

The plaintiffs should have been allowed to prove the value of the fixtures they wanted to remove, by way of furnishing the jury with one material fact from which they might estimate the damage which resulted from the refusal to permit the removal.

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APPEAL from the District Court of the First Judicial District, Hon. RICHARD RISING, presiding.

The facts of the case, and the main features of the pleadings on which this case was decided are fully set forth in the opinion of the Court.

C. E. DeLong, for Appellants.

The Court erred in ruling that appellants could not prove the value of the property at the time of conversion for want of an allegation of value in the complaint. No such allegation is necessary; it is only necessary to aver damage. See form of Declaration in Trover. (2 Chitty's Pleadings, 835; Saunders on Pleading and Evidence, vol. II, part 2, 1144.) As to character of proof to sustain this action, see 2 Greenleaf on Evidence, Sec. 636. As to proof and measure of damages, see Saunders on Pleading and Evidence, vol. II, part 2, Sec. 1162; 3 Burns Just. 68; 2 Greenleaf on Evidence, Sec. 649.

It was wrong to grant a nonsuit; for proof of ownership and conversion entitles plaintiff in trover (and the Court treated this as an action of trover) to a judgment for something. The pleadings admit the ownership and immediate right of possession in plaintiffs. Conversion may be proved either by a wrongful sale or a refusal to deliver on demand.

The nonsuit was equally wrong whether the case be treated as trover or covenant. Everything was proved to sustain the action of covenant except the damages, which the Court would not allow us to prove.

Sunderland, Wood and Hillyer for Respondents.

Any error this Court may have committed in regard to the proof of damages is immaterial if there was no proof of conversion. There was no conversion proved, because defendants are not shown ever to have been in the possession of the plaintiff's property, or to have exercised any control over the same, or to have excluded plaintiffs therefrom. If there is no conversion, everything else in an action of trover is immaterial. The sale by the Sheriff of the

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property mortgaged did not sell the pans, etc., which were leased. They were personal property, and did not pass by a sale of the realty. Plaintiffs might have brought replevin for the property. Nor did McLane sell the pans by his sale of the realty. He never took possession of the pans or pretended to sell them. He only sold what he bought: the real estate included in the mortgage. Neither did he receive from Uznay & Co. rent for the pans, but only rent for the real estate. The rent for the pans was due from Uznay & Co. to Booth & Co.; whether it was paid or not to plaintiff, does not appear, nor was it the business of McLane to know. The refusal of Wells, Fargo & Co. to deliver up the pans, etc., amounted to nothing unless it was in their power to comply with the demand. (3 Phillips on Evidence, 541; 2 Greenleaf on Evidence, Sec. 644, p. 602, *Kelsy v. Griswold*, 6 Barb. 436.) This machinery at the time of demand was in the possession of Uznay, and was not, and never had been in possession of Wells, Fargo & Co.: consequently they could not deliver it.

DeLong in reply.

The evidence shows the property in dispute was affixed to the freehold, and therefore passed by the Sheriff's deed.

Possibly replevin might have been sustained for this property as against the original parties to the lease, but certainly not against a stranger, into whose hands the property came with these things attached to the freehold. (*Merritt et al. v. Judd et al.*, 14 Cal. 59; *Sands v. Pfeiffer*, 10 Cal. 264; *McGreary v. Osborne*, 9 Cal. 121.) The rule as to what is a fixture, is very different in a controversy between vendor and vendee from what it is in a case between landlord and tenant. (See 2 Bouvier's Institutes, pp. 161 to 165.) McLane admits Uznay was his tenant, attorned to him and paid him rent. The possession of the tenant is the possession of the landlord.

The failure of Latham (Wells, Fargo & Co.'s agent) to comply with a request for delivery, is tantamount to an absolute refusal. (*Ferris v. Straus*, 5 N. Y. 19; 2 Abbott's Digest, 430, Sec. 5.) If Wells, Fargo & Co. had placed it out of their power to comply, no demand was necessary. (*Delamater v. Miller*, 1 Conn. 75; *Everet v. Coffin*, 6 Wend. 603; 1 Johns. Cases, 406.)

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Opinion by BEATTY, C. J., LEWIS, J., concurring.

This case presents the following material facts: In the month of August, 1862, Burton, Kellogg and Uznay owned a quartz mill called the Phoenix Mill, and were conducting the business of crushing quartz, under the firm name of "Phoenix Mill Co." At this time their mill property was mortgaged for some \$20,000, and the defendants, Wells, Fargo and Co., held the mortgage as assignees of the original mortgagees. The Phoenix Mill Company being anxious to add some pans and other machinery to their mill, applied to the plaintiffs to rent them the necessary machinery. The plaintiffs consented to enter into the arrangement, provided Wells, Fargo & Co. would become parties thereto so far as to protect them against any loss or danger arising from their claim by way of mortgage.

The result of the negotiation was, that two articles of agreement were drawn up and signed. The first is dated August 14th, 1862, and purports to be between H. J. Booth & Co., of the first part, and the Phoenix Mill Company, of the second part. By this agreement the parties of the first part grant, demise and let to the parties of the second part various articles of machinery, to be delivered at the Phoenix Mill at various specified days between then and the first of October following: the said machinery to be leased to the mill company for the period of six months, from the first of October ensuing, at a monthly rent. At the end of six months the parties of the second part agree to surrender the machinery. There is a further promise that the parties of the second part may, at their option, purchase the machinery after the expiration of six months, at a specified price. This instrument concludes with the usual form of sealed instruments, and is signed thus:

H. J. BOOTH & Co. [L. s.]

PHOENIX MILL Co. [L. s.]

By CHAS. UZNAY.

The second is dated August 15th, 1862. It recites the facts in relation to the mortgage executed by the members of the Phoenix Mill Company, their agreement with Booth & Co. for the machinery,

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and the fact that Booth & Co. might, under that agreement, require the privilege of removing the machinery, and winds up as follows:

“Now, therefore, for the purpose of assuring to said Booth & Co., without objection or hindrance on the part of Wells, Fargo & Co., the right to make such removal if they shall require it, as well in consideration of the sum of one dollar, cash in hand, paid by said Booth & Co. to Wells, Fargo & Co., they the said Wells, Fargo & Co. hereby agree and consent that the said Booth & Co. may have the right and privilege of removing said amalgamating machinery from said mills on the expiration of said six months' lease; provided, that the same shall be done without detriment or injury to the said mills or machinery as it now stands.

“Dated at Virginia City, Nevada Territory, August 15th, 1862.

“H. J. BOOTH & Co. [SEAL.]

“WELLS, FARGO & Co. [SEAL.]

By W. H. SIMMONS, Ag't.”

Several months before the expiration of the lease, Wells, Fargo & Co. took steps to foreclose their mortgage. About two weeks after the expiration of the lease the decree of foreclosure was rendered, and in a little less than a month after the decree the sale took place, and Louis McLane—one of the firm of Wells, Fargo & Co.—became the purchaser. In this purchase, it is admitted he was acting for the company. At the end of six months, the Sheriff's deed was executed to McLane.

In the meantime the original owners of the mill remained in possession. After McLane got the deed the mill company attorned to him and they paid rent, but never delivered the actual possession. McLane entered into a contract to resell to the mill company; but they being unable to pay, this contract was not carried out, and at their request he sold the mill to a third party.

Before this sale was made, Booth & Co. had made a written request of James H. Latham—the agent of Wells, Fargo & Co. at Virginia City, where the property is situated—to be allowed to enter on the premises and remove the leased machinery. To this request the agent made an evasive reply, neither authorizing nor refusing permission to enter on the premises and remove the

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rented machinery. Such appear to have been the facts proved on the trial.

It is necessary now to revert to the pleadings. The complaint is against a number of parties who are alleged to be partners, composing the firm of Wells, Fargo & Co. The complaint first recites the fact of the execution and transfer of the mortgage by the mill company. That they (plaintiffs) were at a certain time the owners of certain machinery. That they refused to rent it until Wells, Fargo & Co., "for a valuable consideration undertook and faithfully promised and agreed to and with said plaintiffs that they, said plaintiffs, should have the right and privilege of removing said amalgamating machinery above described from the said mill at the expiration of the said proposed lease." That upon this agreement being entered into by Wells, Fargo & Co., they leased the machinery to the mill company, setting out the terms of that lease and making it a part of their complaint. That before any part of the machinery was delivered they had entered into the contract with Wells, Fargo & Co. for its removal, etc., stating the substance, effect and legal operation, as the pleader seems to have understood it, of that instrument and setting out the instrument itself, and averring that Wells, Fargo & Co. received a valuable consideration for entering into it. That the machinery was delivered in accordance with the terms of the lease. That the mortgage was foreclosed, and defendants obtained possession of the property mortgaged, including the machinery. The concluding part of the complaint is as follows :

"The plaintiffs further allege upon information and belief, that all of said bottoms, pans, shafting, gearing, etc., are still in said mill, that the said lease has expired, and aver that they, the said plaintiffs, are still the owners of and lawfully entitled to the possession of the said property, and that the same has never been paid for by the said Phoenix Mill Company, or by the said defendants. The plaintiffs further allege that being so the owners, and entitled to the possession of the said property, they did, on or about the 14th day of February, 1865, at Virginia, County of Storey, make demands upon the said Wells, Fargo & Co. to surrender to them all of the said property, or to permit the said plaintiffs to enter

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upon the said premises, and permit them to remove the said property, the said plaintiffs offering to effect said removal without detriment or injury to the said mills or other machinery not belonging to them. The plaintiffs finally allege that the said defendants wholly failed, neglected and refused, and still do fail, neglect and refuse, either to deliver the said property, or any part thereof, to the said plaintiffs, or to permit them to enter upon the said premises and effect said removal themselves. But the said defendants have kept, retained, and converted the said property to their own use and benefit, whereby the plaintiffs have sustained damages in the sum of \$10,000. Wherefore the plaintiffs bring suit and demand judgment against the said defendants for the said sum of \$10,000 and costs of suit."

The answer denies that there was any consideration for the contract entered into by Wells, Fargo & Co. ; denies some of the legal effects alleged by the plaintiffs to arise upon the execution of the contract ; denies that Wells, Fargo & Co. ever got possession of the mortgaged property or had control of the machinery, and closes with the following denial :

" And defendants further deny that they have kept, retained, or converted the said property, or any part thereof, to their own use or benefit, or that by any act of defendants, plaintiffs have sustained damages in the sum of \$10,000, or any other sum whatever."

Upon these pleadings the parties went to trial, and plaintiffs offered to prove, by one Tyrel, the value of the machinery in the month of February, 1865, the time that the plaintiffs demanded permission to remove it. This the Court refused, on the ground that there was no allegation in the complaint of its value at that time. The plaintiffs then offered to prove by the same witness the amount of damages they had sustained by failure and neglect of defendants to surrender the property. The Court refused also to admit this evidence, and then granted a nonsuit on the ground that plaintiffs had failed to prove a conversion by defendants.

To each of these rulings plaintiffs excepted, and now allege that they were erroneous, and the judgment should be reversed.

The first question to be determined is : What is the nature of this action ? The respondents contend that it is trover, and that

there was no proof of conversion, and therefore the action cannot be maintained, and the nonsuit was right. The complaint seems to have been framed as an action on contract. Whether in assumpsit or covenant it would be hard to say. And from the peculiarities of the instrument, (signed with the firm or partnership name of the contracting parties, and having a seal annexed to and following their signatures) it is perhaps equally hard to say whether the contract should be treated as a covenant or a mere written agreement not under seal. But treating it as one or the other, the facts are all set up in the complaint which it would be necessary to set up either in an action of covenant or assumpsit. As our statute does away with all mere form, it is allowable to treat it as one or the other. In addition to all the allegations necessary to sustain the complaint as one on contract, there are also other allegations sufficient to make it a good complaint in trover. If we treat this as an action of trover, at least nine-tenths of the complaint are surplusage. The allegations necessary to maintain that action are simple and few. All the allegations about the contracts, etc., would in such case be surplusage. It is true that the facts stated in the complaint would have to be proved; but if the action is to be treated as one in tort, they ought not to be stated in the pleadings.

On the other hand, if we treat this as an action on contract, then all that part about conversion, etc., which pertains particularly to the action of trover, is to be treated as surplusage. But whatever the action may be, it is for a single object: to obtain damages done to plaintiffs by depriving them of their machinery. Under our very liberal system, the pleading must be sustained, and the plaintiffs will be entitled to recover, if all the facts stated in the complaint, and which are sustained on the trial, either by proof, the admissions of defendant in open Court, or the want of denial in the answer, show that plaintiff has a good cause of action to recover in damages. Let us see first whether the plaintiff is entitled to recover in trover. To determine this, it is necessary to make some investigation as to the nature of what I shall, in this opinion, call *fixtures*. This word "fixture" is used in a variety of senses. In its broadest signification it is sometimes used to designate anything which is by

artificial means attached permanently or substantially to the soil or freehold. But there is another and more technical meaning sometimes given to the word. That is, something substantially affixed to the land, but which may afterwards be lawfully removed therefrom by the party affixing it, or his representative, without the consent of the owner of the freehold. It is in this latter sense that the word is used in this opinion. Fixtures of this kind have been held by many Courts in the United States as personal property, even whilst attached to the soil. As they are the personal property of the party attaching them to the soil before they become fixtures, and as he has the right to remove them at any time, and again convert them into personal property, some Courts have seen proper to hold them all the time as such. Under this view of the case, Courts in Maine, Massachusetts and New York have sustained actions of trover for fixtures that were never removed or detached from the freehold. (See *Russell v. Richards*, 1 Fairchild, 429; *Ford v. Cobb and others*, 20 N. Y. (6 Smith) 344; *Smith et al. v. Benson et al.*, 1 Hill, 176; *Wells v. Bannister*, 4 Mass. 514; *Ashmun v. Williams*, 8 Pick. 402.)

In all these cases the Courts call the things which are the subject of litigation personal property, although they are, technically, fixtures; that is, things attached to the land, but with a privilege on the part of some one other than the owner of the land to remove them. If these cases be law, then we have no doubt of plaintiffs' right to recover in this action, for these pans, etc., clearly became fixtures under the contracts with the Phoenix Mill Company and Wells, Fargo & Co. The sale of the property and purchase thereof by McLane for Wells, Fargo & Co., did not change their status. There can be no doubt but that as long as either the one or the other of these parties held the mill, the plaintiffs had a right to take off the pans. McLane, acting for Wells, Fargo & Co., converted the pans by selling them with the mill. No other proof of conversion but the sale of the mill with its fixtures, was necessary. Under these authorities, Booth & Co. could either treat the sale by McLane as a conversion and sue Wells, Fargo & Co., or might demand the pans, etc., from the present owners of the mill, and on their refusal to surrender, sue them.

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But whilst these authorities, highly respectable in character, support this view of the case, the writer of this opinion cannot but dissent from the views expressed in all these cases. In my opinion, property is either real or personal, according to its nature. Contract cannot make a chattel realty, nor realty a chattel. The case cited from 1 Fairfield shows the danger of such departures from common law principles. In that case, a man buys a piece of land with a saw-mill on it. He knows nothing about anybody but the owner of the freehold having any claim to the mill. But after the purchase, he is sued for the mill, and its value recovered from him. If such a doctrine is tenable, then the man who buys a lot covered by a brick house may, without any negligence on his part, be compelled, after having paid the owner of the soil for lot and house, to pay somebody else for the house. Such a doctrine appears to me extremely dangerous. The New York Courts seem to hesitate in following the Maine case to its legitimate result. They seem only willing to apply the principles of this case when the property in controversy approaches the character of personalty in its nature. But if mere contract can convert potash kettles built into a wall in such a manner as to be firmly attached to the freehold, then it can also convert saw-mills and granite walls into personalty. In my opinion all fixtures whilst attached to the freehold are, for the time being, a part of the realty. No contract can change their nature. It is true there may be a contract allowing some one to take them off. Indeed, unless there be some contract, law or custom allowing such removal, they are not technically fixtures. But a contract that something may be converted into personalty at a future day, does not make it so from the time of the contract. The owner of the land might make a contract allowing another to take off all the soil to the depth of ten feet for making brick; but the contract alone would not convert the surface of the soil into bricks or other personal property. It would still be a part of the freehold. In my opinion this complaint should be treated not as a declaration in tort, but as one on contract. As such I believe it to be sufficient.

The necessary preliminary facts appear by the pleadings; the instrument which is the foundation of the action is set out, and we

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think a breach is well assigned. Among other things, defendants agreed that plaintiff might "have the right and privilege of removing said amalgamating machinery from said mills," etc., etc.

The breach assigned is, that defendants wholly failed, neglected and refused, and still do neglect and refuse to deliver said property (amalgamating machinery) * * * * *or to permit them* (plaintiffs) *to enter upon the said premises* (the premises where the machinery is fixed) *and effect said removal themselves*. The breach is not in the same language of the contract, yet it seems to be sufficiently stated. The answer does not negative this breach. There are indeed but few material allegations or denials in the answer. It denies any consideration for the agreement, but ample consideration is proved. It denies any damage, and denies that defendants were ever in actual possession of the mill and machinery. These are all the material denials therein contained. The denials of any damages arising from the action of defendants, put the plaintiffs on the proof of these damages, and we think one of the best methods of proving these damages was to prove what the machinery was worth when plaintiff asked permission to remove it. Of course the value would have been diminished by the cost of removal, but that cost would have been a proper subject of cross-examination. There is nothing in the point that plaintiff did not aver the value of the machinery at the time he offered to remove it. Such an averment would have been unnecessary, treating this action as in tort, or on contract. The proper averment was the amount of damage sustained by the tort or breach of contract; proving the value of the property was only one of the many methods of proving the damage. We are not by any means satisfied that the fact that defendants never were in the actual possession of the mill is a sufficient excuse for refusing to permit plaintiffs to enter and remove the machinery. *Non constat*, but that if defendants had consented, their tenants who were the original lessors of plaintiffs, would also have consented to the removal of the machinery. As the pleadings stand, it appears to us the plaintiffs should have been allowed to prove their damages.

The cause is reversed, and remanded for a new trial.

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LUCICH *et al.*, LEGATEES, APPELLANTS, v. MARCO MEDIN
et al., RESPONDENTS.

Although the same Court has jurisdiction, under our system, of cases at law, in equity and in matters of probate, yet the several classes of cases must be kept separate, and a petition to the Court of Probate cannot be confounded with an action at law or a suit in Chancery.

This is a petition to the Probate Court, and if treated as a bill in equity there would be a fatal objection to it. To wit: that it was a bill filed to surcharge and falsify the accounts of an executor who had not yet made a final settlement.

An error in the names of the petitioners in a case in probate pending and undetermined, may be corrected. It is not such a fatal error as would be the bringing of a suit in the name of the wrong parties.

Waste, negligence and mismanagement afford as good grounds for the removal of an executor, as actual fraud.

If an executor qualify as such, and totally neglect his duties, he should be removed, although he has committed no positive act of wrong.

An executor who takes charge of an estate which is not in debt a dollar, except for the last sickness of the testator—which only lasted fifteen days—with cash assets on hand to the amount of \$4,300, and a monthly rental of \$500, and runs that estate behind to the extent of \$1,800, in nineteen months, is *prima facie* unfit for the trust he is exercising.

An executor may employ counsel to attend to the litigation concerning the estate. But he has no right to employ counsel at the expense of the estate to keep the accounts and do that business for which he is compensated by his fees. If he is too ignorant to keep his own accounts, he must employ some one else to do it for him, and pay for the same out of his own per centage, which he is allowed for settling the estate.

Sec. 239 of the Probate Act seems to provide that what is settled at one settlement of an executor's account shall not be open to resettlement at any future time in the Probate Court.

The rule that a Probate Court cannot reinquire into that which has once been settled, only applies to those items of account which were properly before the Court for adjustment. The general result at which the Probate Court arrives is immaterial. It is only as to the items of account acted on that the doctrine of *res adjudicata* applies.

It has been held, a mistake in a former settlement may be corrected in a subsequent one. The only difficulty in applying this rule is, to determine what shall be treated as a mistake, and what shall stand as *res adjudicata*. Perhaps the best rule is to say, everything may be corrected which shows on its face the mistake, or error. This would allow the Court, before final settlement, to correct its own errors of judgment, but not to go *de novo* into proof of items already passed on.

Where an executor files an account showing a certain balance for or against an estate, but never settles the same; then files a second account, beginning with

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the balance drawn from the first, and there is a regular hearing and settlement of this second account; this can be held *res adjudicata* only as to the items of the second account, (other than the balance with which it commences) and all the items of the first account are open to investigation.

Under the 208d Section of the Probate Act, an executor may pay money to compromise a suit pending against an estate. But he cannot lawfully make such payment without the previous consent of the Probate Court.

When a party who is executor of the estate of a deceased cotenant in common, pays money to compromise a suit about the common property without consulting the Probate Court, he will be held to have paid as a cotenant, and not as executor.

In such case, the heirs of the deceased cotenant will be allowed the option to approve the compromise and contribute their share of the money paid on the compromise, or reject the same and depend on the testator's former title.

An executor cannot borrow money to speculate for an estate, unless specially authorized by the will to do so.

An executor having stock on hand liable to assessment, should either get an order of the Probate Court to sell it, or else, if the estate is surely solvent without the stock, turn it over to the legatees. He should not borrow money to pay the assessments.

ON REHEARING: *Held*, a Probate Court may correct its own errors in the settlement of estates, either in regard to matters of law or fact, at any time before final settlement, provided such corrections can be made from the record without opening the proof in the case.

What appears on the face of an account and interlocutory decree to have been once settled must remain closed, unless the record itself discloses some error.

Passing an account with a certain item as a credit thereon in favor of the estate, would not preclude proof in a subsequent settlement of another item of credit in favor of the estate which was not on the first account. Nor would a general entry in favor of the estate of so much money received from rents, preclude those interested in the estate from showing that other money was on hand besides that reported. Nor that the several sums received for rent would amount to a greater sum than that entered. The account of an executor or administrator must show the items of account, and not merely the general result of certain transactions.

An executor who came into possession of an estate in his fiduciary capacity, cannot buy up an adverse title to the estate, and withhold the rents on his mere *ipse dixit* that the title he has bought up is superior to that of his testator.

APPEAL from the District Court of the First Judicial District Court, Hon. RICHARD RISING, presiding.

The facts of the case are stated in the opinion.

C. E. DeLong and *W. H. Rhodes*, for Appellants.

The principal argument on the part of appellants was directed to

a review of the testimony, with a view of showing the alleged fraud.

The following extracts from their brief will show some of the more important legal positions contended for:

"The petition containing all the elements of a bill in Chancery, and stating facts sufficient to constitute a cause of action, and the defendant having appeared and answered, the question arises: Has a Court of Chancery the inherent jurisdiction to retain a bill for the purpose of annulling and setting aside the settlement of an executor's account, on the ground of fraud and mistake?

"Were this *res integra*, an argument might be made sufficiently plausible against it. But the question has been settled in the affirmative for too many years to be disturbed.

"In North on Probate Courts, note to page 176, the whole question is thoroughly reviewed, and the conclusions thus summed up by that Judge: 'It is not competent for the Probate Court to decide that any account is so far final as to bar all further inquiry in regard to matter not included in the account already settled, and to oust the Court of jurisdiction. (*Field v. Hitchcock*, 14 Pick. 405; *Stearns v. Stearns*, 1 Pick. 157.)

"And if, at any time before final settlement of an administrator's account, any manifest mistake should occur, it is competent for the Judge of Probate, on proof, to correct it in subsequent accounts presented by the administrator.

"The accounts settled by an executor or administrator, in a Court of the proper jurisdiction, are *prima facie* evidence in his favor, and can be impeached for error or fraud only.

"This is a general rule, and has been recognized and settled in most Courts having cognizance of testamentary matters in the United States.' 'Citing the following cases:' (*Smith v. Hurd*, 7 Howard Miss. 188; *Allen v. Clark*, 2 Blackf. 343; *Turner v. Williams*, 7 Yerg. 172; *Owens v. Collinson*, 3 Gill and J. 25; *McCullough v. Montgomery*, 7 Serg. Raw. 31.) He proceeds: 'A final account, however, has no conclusive effect of a judicial sentence, between the administrator and the distributees, and does not bar them from proceeding to falsify and surcharge it on the ground of error and fraud,' citing *Vestner v. McMurrin*, 1

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Freeman Ch. Rep. 149; *Pratt v. Northam*, 5 Mason, 95. See also, *Turner v. Williams*, 7 Yerg. 172.

In *Dayton on Surrogates*, 543, speaking "of the effect of final settlement," he says: "With regard to infants who did not duly appear, or were not legally represented on the accounting, it was before suggested that their rights were not, in any way, affected by the proceedings. But the point remains to be decided. As to those persons under disabilities, *bound only by publication*, it is probable that the executor or administrator will always continue liable for their claims until they shall be barred by reason of staleness, or the application of the rules prescribing the limitations of actions. (See *Ellet v. Rathbun*, 4 Paige, 102.)

Now it is to be observed that there is no pretense that a personal service was made on any of the heirs. They were summoned only by publication, and so the record itself shows. Now the bill alleges fraud and error in the settlement, and the evidence shows it. Can any Court legalize fraud? Has not Chancery inherent and inalienable jurisdiction to correct errors or mistakes, and to set aside, uproot and relieve against fraud? The statement of the proposition suggests the answer.

Has an executor a right to contract for stipulated interest for any purpose? The intestate himself could not do it except by an agreement in writing, yet here the executor attempts to charge it on a verbal contract. But the pretexts of borrowing these sums are such that the law will not tolerate. The stock ought to have been sold. How can an executor create a new debt against the estate? The second sum, even if borrowed at all, which is extremely doubtful, cannot be charged against the estate for two reasons:

First. The estate has never received any benefit, the title still being in Medin. The record shows that he has never made a deed to the heirs of the interest he pretends to have purchased from La Page *et als*.

Secondly. Because the claim against the property was never presented by the litigants to the executor as required by Sec. 140 of the Estates Act. (1 Nev. St. 208.) And the law does not give the executor the right to compromise, except by order of the Court. (See Sec. 144, *Ib.* 209.)

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Dayton on Surrogates, 534, says: "A charge of interest by an administrator will be viewed, however, with caution, and the circumstances offered to sustain it *will be examined with scrupulous care.*" We refer the Court, also, to the recent case of *Tompkins, administrator, v. Weeks et al.*, reported in 26 Cal. 50.

Williams & Bizler for Respondents.

A decree of a Probate Court settling an account is conclusive, and can only be overturned by appealing to a higher Court, or by bill in equity attacking it for fraud or mistake. Once passed on by the Probate Court, that Court cannot review its own decision. (Stat. of 1861, p. 225, Sec. 239; *Mercen v. The People et al.*, 25 Wend. 96-7; *Conor v. Mayor, etc.*, 25 Barb. S. C. 513; *Thompson v. Harwood*, 1 Ed. Chancery R. 501-2-3; *Sandford v. Head*, 5 Cal. 298; 8 B. Monroe, 507.)

A decree correcting mistakes in an account not final, will not be made because the Probate Court may, in its final account, correct such mistakes. (*Stearns v. Stearns*, 1 Pick. 157.)

This is not a proceeding in equity, and Medin did not waive his objection to the form of proceeding. A party may appear for the purpose of objecting to the form of a proceeding, and if the objection is overruled, may defend upon the merits without waiving his objection (*Deidesheimer v. Brown*, 8 Cal. 339; *Avery v. Slack*, 17 Wend. 86.)

Supposing this case be treated as a bill in equity, let us examine its sufficiency. Having relied solely upon charges of fraud to obtain the relief sought, we presume that the Court will agree with us without requiring a citation of authority or argument, that it devolves upon the complainant to establish clearly their charges, and that all intendments and presumptions are in favor of the defendant. It is not sufficient for them to raise a doubt whether the defendant has acted fairly in his dealings with the estate, but they must satisfy the Court that he has not.

The rest of respondent's brief is devoted to an examination of the particular charges of fraud, and the testimony bearing on them.

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Opinion by BEATTY, C. J., LEWIS, J., concurring.

In this case, a petition was filed by Luca Jancovich and Dodato Milinovich against Marco Medin and Vincent Milatovich, executors of Marco Milinovich, deceased. The petition is headed, "In the matter of the estate of Marco Milinovich, deceased." In a subsequent stage of the proceedings, by leave of the Court, the names of both these petitioners were struck out from the title of the petition, and the following names were inserted in lieu thereof: "Andreane Lucich, Andrew Milinovich, Bogdan Milinovich and children of Marietta Barbarovich, deceased, John and Andreane Barbarovich, legatees."

The petition shows that Marco Milinovich died at Virginia City on the fifteenth day of July, 1863, leaving Marco Medin and Vincent Milatovich his executors, who subsequently qualified as such. It further shows that Andreane Lucich and the others who were substituted with her as petitioners were the residuary legatees of decedent's estate, both real and personal. The petition further shows that all the residuary legatees are foreigners, not residing in the United States, and that the original petitioners were the agents or attorneys of the legatees. The petition then alleges that the executors never filed a joint inventory, but that Medin only filed a separate inventory on the — day of —, 1863, showing property to amount of about \$27,857.50. The other executor never filed any. Letters testamentary were issued to Medin in 1863, and to Milatovich about the first of July, 1864. No joint accounting has ever been had by said executors with the estate.

It is further charged that Medin's inventory was not correct, true, or complete. It charges him with fraudulent suppression and concealment of certain property. It charges him with fraud in a settlement made with the Probate Court in February, 1865. It sets out many particulars in which the settlement is fraudulent, and winds up with the following prayer:

"Wherefore, the premises considered, your petitioners respectfully pray that the said executor be cited to appear and show cause why he shall not be compelled to file a further inventory of the property of said estate, and to show cause why the settlement of

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said accounts above referred to should not be set aside, annulled, and revoked. Your petitioners further pray the Court that said executor be immediately ordered to file *de novo* full, true, and correct accounts of all property of said estate—real, personal, and mixed—which has come to his knowledge or possession; of all moneys received or paid out in behalf of said estate; and that he be ordered to bring into Court proper and satisfactory vouchers for all sums disbursed; and your petitioners pray the Court for all such other and further relief as may be just and proper.”

The Court below went into proof as to the various allegations in the petition; came to the conclusion that there were some mistakes in the settlement of the executor Medin, but no fraud, and dismissed the petition. The petitioners moved for a new trial, which was denied, and appeal to this Court from the judgment or order of dismissal and from the order refusing a new trial.

Upon the argument of the case in this Court, one of the points most seriously urged by the respondents is, that the petition does not state facts sufficient to entitle the petitioners to the relief sought. This brought up the question whether this petition might not be treated as a bill in equity. The petitioners insist that the District Court, having equity jurisdiction, and the facts in this case stated being such as to require the interposition of a Court of Equity, the proceeding may be treated as a suit in equity, and a decree rendered giving such equitable relief as the proof in the case will justify.

We think the counsel for petitioners are not correct in this position. Although the District Court has jurisdiction in common law, chancery and probate cases, yet the proceedings in each are separate and distinct. At least, a proceeding in a probate case must in its very nature be distinct from an action at law or a suit in chancery. Under our practice an equitable defense may be set up to an action at law, and in this way the common law and chancery practice become to some extent blended in the same case. In other respects the proceedings in chancery, at common law and in Probate Courts are distinct, and the proceedings in one class of cases should not be mixed up with those of another. This, it appears to us, was peculiarly a proceeding in the Probate Court, and

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had none of the characteristics of a suit in equity. If it were a suit in equity, there would be a fatal objection to it. It would be a bill to set aside the settlement and accounts of an executor who has not yet made his final settlement with the Probate Court. This, it appears to us, would be very objectionable. A Court of Equity certainly has the power to inquire into the *final account* of an executor, and proceed to hear evidence to falsify and surcharge the account for fraud, and to render such decree as is necessary to do equity in the case.

But if any bill has ever been sustained against an executor to falsify and surcharge an account *not final*, it has escaped our observation, and we are not referred to any such in the brief of counsel.

We think such a practice would be extremely inconvenient. If indulged, it might result in having several bills pending between the same parties at the same time, regarding the settlement of a single estate. There would certainly have to be something extraordinary in the case before a Court of Equity would countenance such a proceeding.

We must, then, consider this as a proceeding by petition in the Probate Court, and endeavor to see to what relief the petitioners are entitled. The petition was presented in the first place rather irregularly by the attorneys of the legatees, in their own name instead of the name of the legatees. Whilst this was irregular, it was not, perhaps, fatal to the petition.

The petition is entitled, "In the matter of the estate of Marco Milinovich, deceased." Such an estate was in course of settlement before the Court; an error in the parties to the petition was such an error as we think the Court might amend, and properly did amend, by substituting the names of the legatees for those of the attorneys. It is not like bringing a suit in the name of the attorney instead of the principal, which would be such a fundamental error as could probably only be remedied by bringing a new suit in the name of the proper parties. If we look at the facts stated in the petition, we think it shows abundant grounds for asking the interposition of the Court to protect the estate from utter waste and destruction. The prayer of the petition does not appear to have

been framed with a view to the exact relief which a Probate Court could have given under the existence of a state of facts such as is stated in the petition.

Section 115 of the Probate Act is as follows :

“ Whenever property not mentioned in any inventory that shall have been made, shall come to the possession or knowledge of an executor or administrator, he shall cause the same to be appraised in the manner prescribed in this chapter, and an inventory to be returned within two months after the discovery thereof; and the making of such inventory may be enforced after notice by attachment or removal from office.”

The first part of the prayer is certainly directed to the relief provided in this section, and the allegations of the petition and the proof equally show that the Court should have ordered a new inventory.

Sections 226, 7, and 8, of the Probate Act, read as follows :

“ SECTION 226. Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the Probate Judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts, showing that it is necessary and proper that such an exhibit should be made.”

“ SEC. 227. If the Judge be satisfied, either from the oath of the applicant, or from any other testimony that may be offered, that the facts alleged are true, and shall consider the showing of the applicant sufficient, he shall direct a citation to be issued to the executor or administrator, requiring him to appear at some day to be named in the citation, which shall be during a term of the Court, and render an exhibit as prayed for.”

“ SEC. 228. When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objection in writing, contest any account or statement therein contained. The Court may examine the executor or administrator, and if he has been guilty of negligence, or has wasted or embezzled, or mismanaged the estate, his letters shall be revoked.”

Under the provisions of these sections, if the allegations of the petition are true, the executors should have been cited to appear,

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and if it was shown by the evidence that the executors had been guilty of *negligence, waste, embezzlement, or mismanagement* of the estate, they should have been removed. The final settlement of the accounts with the executors should have been made, and they ordered either to pay over the money and estate to the legatees, or to an administrator, with the will annexed, as the case might require. The transcript contains neither the will of decedent, the inventory of the effects, nor the powers of attorney of those parties who are representing the legatees. In the absence of these necessary documents, the Court cannot say what order should be made in the premises.

The transcript before us contains over three hundred pages; nearly three hundred of it is taken up with the testimony. The handwriting is not very legible, and we will not attempt to say whether the charges of fraud have or have not been sustained. To determine this point would require a careful weighing of the testimony, which would be very difficult with such a transcript. It is certain, if the evidence for the petitioners is true, there have been gross and outrageous frauds practiced. But, on the other hand, this evidence is contradicted in all material points by that of respondents. We think the Court below, on a rehearing, will be better able than ourselves to weigh this evidence, and accept what is probable and reject what is improbable and not entitled to credit.

But outside of the question of fraud, there are other questions which it is proper for this Court to pass on. Waste, negligence, and mismanagement are equally as good grounds for removing executors as actual fraud or embezzlement.

In this case, one of the executors has totally neglected his duties as such. He appears to have done really nothing. If one qualifies as executor it is not enough that he fails to do anything actually wrong: he must do what is necessary to protect the estate, or he should be removed.

The other and managing executor has certainly wasted and mismanaged the estate in almost every conceivable way.

When he came into possession of the estate he found \$1,480 in gold, belonging individually to the testator, besides his share of cash on hand in saloon, amounting to \$443.75, in all \$1,923.75.

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Decedent also had a half interest in liquors to the value of \$4,758.36, at invoice price, if we understand the testimony, or if that was not the invoice price, it was the invoice price with the freight added. These were readily saleable at the cost price, and perhaps something more, so that he had what was equivalent to at least \$4,300 in cash. He also came into the possession of real estate which was producing a monthly rental of about five hundred dollars. The estate did not owe, apparently, a dollar, except the expenses of testator's last sickness, which only lasted about fifteen days.

At the end of nineteen months the personal property is all gone, and the acting executor brings out the estate as \$5,341.22½ in debt to himself, having in the meantime paid legacies to the amount of \$3,538. In other words, he brings the estate in debt to himself some \$1,800 over and above what he has paid to the legatees.

This certainly suggests to the mind at once some mismanagement of the affairs of the estate by the executors. If we examine the items of expense in detail, that impression certainly is not removed.

When the testator died he was half owner of a drinking saloon, which, it seems, made a *profit* of nearly \$900 in the fourteen or fifteen days during which he was sick. After his death, the executor Medin, who was also part owner of the saloon, made haste to sell the same, nominally, to Mark Lovely and Spiro Vicanovich. He did not wait to qualify as executor, he did not have any appraisement of the stock on hand by any reliable and accessible person. He did have it appraised by a Mr. Dougherty, but he was not a resident of the State, and was not produced in the trial of this motion in the Court below. While the sale of the saloon was made nominally to Lovely and Vicanovich, there is certainly testimony enough to show that Medin himself was the real purchaser of at least one-third of the establishment, and indeed some testimony tending strongly to show that Lovely was then an agent of Medin, and that neither he nor Vicanovich paid anything for their interest in the saloon at the time of the sale. That the business was carried on with the means of testator, and nothing paid to Medin except the proceeds of sales from the liquors until he was paid up. This was certainly neither a prudent nor commendable

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method of proceeding. It is, to say the least of it, calculated to throw suspicion on his conduct and motives.

Mr. Medin selects Mr. Dougherty as the appraiser, but he is at once the purchaser and the seller. His flimsy attempt to show that he only came into the concern *after* Lovely bought it, is only calculated to make his motives the more liable to an unfavorable interpretation.

When at a subsequent period he qualifies as executor, instead of stating the amount of money and liquors on hand in the saloon in which testator had a half interest, he only returns \$1,295.47 as the net proceeds of testator's share, thus swallowing up more than half of the testator's share without any showing of what had become of it.

He makes the funeral expenses of the testator (a saloon-keeper in fair circumstances, but not very wealthy) over \$1,200. He pays large assessments on mining stocks without any order of the Probate Court for so doing. He charges interest for money he probably never borrowed, or if he did borrow it, it was without the shadow of authority so far as shown by this transcript. What authority he may have derived from the will of the testator or the powers of attorney of the legatees we know not. He paid one attorney \$500 for nothing that we can see, unless it was for advising him how to squander the estate. He pays, or claims to have paid, another, the same amount for compelling himself to admit his coexecutor to a participation in the management of the estate.

When an estate is involved in litigation an executor has a right, and it is his duty, to employ counsel at the expense of the estate to defend its interests, but he has no right to charge the estate with the expense of counsel for doing what he himself should do. An executor is paid a per centage for keeping the accounts and attending to the ordinary affairs of an estate. If he is so ignorant as not to be able to do this himself, he must out of his per centage pay for the necessary assistance.

In this case, the estate was involved in no litigation requiring the employment of counsel, except the litigation about the title to real estate. For that there is a separate charge, distinct from the two items of \$500 each, to which we have alluded. We have

alluded to all these extravagances to show the necessity for immediate action on the part of the Probate Court.

That Court should immediately order the executors to file an account making a full showing of all the property and assets that have come to their hands up to the date of filing such account. The Court should cause a settlement to be made with the executors, and all proper orders made to stop the unnecessary waste of the estate. Without the will before us we cannot tell what are the necessary orders to be made. Whether the estate shall be distributed among the legatees and devisees, placed in the hands of an administrator with the will annexed, or continued in the hands of the present executors, with such orders about the management of the estate as will stop the reckless expenditures heretofore indulged in, we cannot determine from the transcript before us.

One of the great difficulties presented to our minds in disposing of this case is, to determine what the Probate Court may review, determine or adjudicate when the case goes back for trial.

The 239th Section of the Probate Act seems to provide that what is adjudicated in one settlement of an executor's or administrator's account shall not be open to adjudication in any future settlement in the Probate Court.

That a *final* settlement with an executor or administrator is and ought to be considered *res adjudicata*, and not open to further question, except when a bill in chancery is filed charging fraud, is a well settled principle; but to hold that a partial and incomplete settlement should preclude the Probate Court from further examination of the executor's accounts, seems, to say the least, rather inconvenient. In obedience, however, to what appears to be the plain letter of the statute, we must so hold. But in holding that a partial account, acted on by the Probate Court, is to be considered as *res adjudicata*, we have high authority for saying it is only to be so treated as to those matters which the account and the decree of the Court show were fairly before the Court for adjudication. The general result at which the Court arrives, even in a *final* settlement, is immaterial. If the Probate Court finds, for instance, that an executor has properly paid out all the estate that came to his hands, this will not prevent one interested in the estate from pro-

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ceeding in the Probate Court to compel the executor to account for property not mentioned in his account.

The settlement of an account is only *res adjudicata* as to those matters actually embraced in the account. For this principle see the very sensible opinion of Chief Justice Shaw in the case of *Field v. Hitchcock*, 14 Pickering, 405.

It has also been held that where a *mistake* appears in a former settlement, it may be corrected in a subsequent one. (See 1 Pickering, 159-60.)

It may be difficult to determine, under this latter rule, where the line is to be drawn as to that which may be corrected as a mistake and as to that which shall stand as *res adjudicata*. It would at least be safe, if anything is to be corrected which has once been passed on, to say everything is liable to correction which shows upon its face that it is erroneous: that there has been a mistake either of fact or law as to that item.

This would allow the Court, at any time before final settlement, to correct its own errors, but not to reopen the proof as to accounts allowed, except perhaps in cases where the account showed error *on its face*, but did not show (without explanation) the extent of the error.

So, too, where anything is admitted by the executor or administrator to be a mistake, all this may be corrected. But if the mistake or error are only to be shown by going anew into the proof, this should be held as *res adjudicata*, and not liable to be opened to new testimony.

Adopting these rules, then, let us see what can be investigated in a new trial of this motion. There was an account filed by one of the executors in February, 1864, but no notice seems to have been given as to the settlement of this account, and no action seems to have been taken thereon. In February, 1865, a second account was filed, not embracing what was contained in the first, but merely setting out with the balance as shown by that account, and *continuing* the account from that time down to the filing of this second account. Upon the filing of this account, notice was given that the Court would hear exceptions to the same, and take such steps as the law requires for the settlement thereof. This case seems to have

been regularly brought to a hearing, and the account was examined. But, in approving this account, we hold the first account was in no manner approved or acted on. Had the first account been properly approved, then it would have been proper to commence where that left off. But as the first account was never approved, the mere assertion in the second account of what appeared as the balance due on the first cannot be held to preclude an examination into the items of the first.

The first account has never been the subject of adjudication. That the Court and the counsel who drew up the decree of settlement considered only the latter account as adjudicated is apparent from the language of the decree. That decree concludes as follows :

“ And it appearing to the Court, after due examination, that said account contains a just and full statement of all the moneys received and disbursed by said executor from the twelfth day of February, A.D. 1864, the date of the preceding report of said executor, to the twelfth day of February, A.D. 1865, including all sums of money belonging to said estate which came to his hands as such executor, or were received by another by his order or authority for his use as such executor, during said period ; that the amount of said money thus received was \$6,483.83½, and the amount thus disbursed \$11,825.06, leaving said estate debtor to said executor in the sum of \$5,341.22½ ; that for the items of disbursements proper vouchers are produced to the Court ; and it being proved by the affidavit of said executor, annexed to his account, that the items of his expenditure named and charged in said account have actually been paid and disbursed by him, at the place where, the date when, and the parties to whom the said payments are stated in the said account to have been made respectively. And the Court having duly considered the said report and account, and the proofs and allegations and matters aforesaid :

“ The Court finds that the said account is just, true, and correct, and entitled to be allowed and approved.

“ And now, on motion of G. D. Keeney, Esq., attorney for said executor, it is ordered and decided that the said account and report of Marco Medin, executor as aforesaid, be and the same are

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hereby in all respects, as the same were rendered for settlement by the said Marco Medin, executor, etc., approved, allowed, and settled."

If, then, only the second account was properly adjudicated, all that was embraced in the first account is open to inquiry. The Court may inquire into the funeral expenses, both as to what was expended and as to the reasonableness of the expenditures. It may inquire into the circumstances of the sale of the Uncle Sam stock, as to whether it was a fair and *bona fide* sale. The same taxes are admitted to be included in both bills: they must of course be excluded from the first. Inquiry may be made into the matter of rents from the death of testator to February 12th, 1864, the value of liquors on hand, the fairness of the sale, etc. Indeed, the whole question is open, so far as the period from the death of testator to February 12th, 1864, is concerned; and the executor should be compelled to make a full showing as to this part of the affairs of the estate, both as regards the property which came to his hands and as to the repairs he made. His vouchers for expenditures in repairs should be produced, or if lost, accounted for.

Inquiries may also be made as to whether these expenditures were reasonable and proper. Of course the executor must account for jewelry, etc., omitted from the invoice.

With regard to the compromise affair, we are more at a loss than in regard to any question presented in the record.

Here is an item of the account of February, 1865. If anything was adjudicated in regard to this item, it was: first, determined that this amount was paid; second, it must also have been determined that it was rightfully paid: for these are the very questions presented as to each item of an account presented for settlement. Whether it was paid, was a question to be determined by proof. Whether it was rightfully paid, was a mixed question of law and fact. If the executor, on his own motion, could pay this amount of money and hold the estate responsible, then we must in this case presume that it was proved to the satisfaction of the Court that this was rightfully paid. But we incline to the opinion that an executor, without the order of the Court, could not lawfully make such payments. A suit pending

against the estate at the time, we are inclined to think, under the provisions of the 203d Section of the Probate Act, might, upon the order of the Probate Court approving such a course, have been compromised, and the money paid to effect a settlement. But the executor, without the advice of the Court, had no right to make such a compromise.

He did, however, make the compromise ; and as he was both executor and tenant in common, he must be considered as having made it in his capacity of tenant in common.

The law is well settled that when one tenant in common buys in an outstanding title, it inures to the benefit of all his cotenants, if they elect to bear their share of the burthens of the purchase. (See 4 Kent's Commentaries, p. 311, note C, 10 edition.)

But the cotenants cannot, we think, (unless they have previously assented to or encouraged the purchase) be compelled to contribute. It appears to be purely a matter of choice with them whether they will contribute and take the benefits of the purchase, or stand on their former rights. We have not met with any reported case where a cotenant has been forced to contribute, where he fairly and openly chose to renounce the benefits of the purchase.

The devisees in this case are then entitled either to contribute or reject the terms of this compromise. We think that right has not been and cannot be properly presented to them in the Probate Court. This is a matter to be settled between the parties amicably, or in a Court of Equity. The Probate Court has nothing to do with it.

The executor clearly had no right to borrow money for the estate unless expressly authorized by the will, and the charge for interest in his second account must be struck out unless so authorized. An executor has no right to speculate for or with the estate. If he held mining stock which was likely to be forfeited before he could apply to the Court for instructions, he might be justified in paying something to preserve it. But he is certainly not justified in borrowing money for mining speculations.

If he held stock liable to large assessments, he should have applied to the Court for leave to do one of two things : either to sell the stock, or, better still, if the estate was surely solvent without the stock, to turn it over to the legatees, and let them sell, or take their chances on speculation with it.

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The order of the Court below must be reversed and set aside.

The petitioners will be allowed to amend their petition, if they so desire ; and further proceedings will be had in accordance with the views expressed in this opinion.

RESPONSE TO PETITION FOR REHEARING.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

In this case a petition for a rehearing has been filed, indicating that the original opinion herein has, to some extent, been misunderstood. Had counsel read the opinion a little more carefully, it appears to us at least a portion of the matter contained in the petition might have been omitted.

However that may be, we will endeavor to make ourselves more fully understood on some of the points referred to.

We did not hold, as counsel say, "that the 239th Section of the Probate Act makes the settlement of an executor's or administrator's account final and not open to further question, except by bill in chancery charging fraud." At least we did not hold it in the unqualified terms used by counsel. We distinctly held that the Court, notwithstanding the 239th Section, might, at any time before *final* settlement, correct its own errors, whether of *law* or *fact*. That any error apparent on the record might be corrected before final decree, but the Court could not open the *proof* as to the matters of account already passed on and settled by interlocutory decree.

It is the failure to notice this distinction which seems to have misled counsel in various particulars.

Counsel complain that this Court assumes that there never was but one settlement of the executor's accounts upon notice, whilst in fact there were two such settlements. That they were injured by this assumption of the Court. That no such point was ever made by the opposing counsel, and if it had been, they could have shown that it was unfounded. That if the record fails to show both settlements it was not the fault of respondents, it having been made up solely under the direction of appellants.

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The plaintiffs (appellants) attack certain payments and expenditures of respondents. The respondents say these expenditures cannot be inquired into, because they have already been passed on by the Probate Court. To show that they have been passed on by that Court, respondents refer to a decree which clearly shows that part of these items have been passed upon, but fails to show any adjudication as to other portions of the account. This decree is contained in the record before this Court.

We certainly could not know that respondents had introduced evidence in the Court below which was not contained in the statement of the case, or that their answer contained matter not copied in the record. If the transcript failed to contain any portion of the evidence or pleadings material for the defense, it was the business of respondents' counsel to have the record amended.

Reference is made in the petition to various expressions in the transcript which counsel seems to think indicate that there were two decrees actually made in the Probate Court in regard to these accounts. We think no one, not otherwise acquainted with the fact, would ever have drawn such inference from the record. All the expressions quoted are entirely reconcilable with the existence of but the single decree found in the record, except one word. The word *decrees* is used in one place where it should have been in the singular, (*decree*) if there was only one settlement. But when that word appears in the record, it seems to be shown by what immediately follows that the *s* was a mere clerical error.

The transcript is so badly made up, that we are at a loss sometimes to understand how certain matters got into it. The body of the answer, as contained in the transcript, makes no reference to any exhibits. But immediately after the affidavit to the truth of the matter contained in the answer follow the two accounts, and then this sentence: "That upon the filing of the accounts such proceedings were thereafter had, that the Court rendered and entered the following *decrees*." After this follows the decree settling the last account only. Then comes a statement of the evidence, etc. On the margin of these accounts is marked, "Answer continued." We infer then that these accounts and this decree must have been attached to the answer as exhibits. But because the Clerk uses the

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plural, *decrees*, we could not well infer that there was another decree attached as an exhibit to the answer which he did not copy. Especially could we not so infer when the answer wholly fails to aver the existence of any such decree.

But whilst the record utterly fails to show in any manner that there was more than one decree in regard to the settlement of accounts in this estate, we will so far modify our former opinion as to direct the Court below to give to the first account, if it should appear to have been properly settled upon notice and a regular decree of settlement made thereon, the same effect that we have given to the second account, which was settled in March, 1865.

Whatever upon the face of the account and decrees seems to have been once adjudicated must be considered closed, except in so far as the record itself may show some error in the former decree. If it should appear that this first account was regularly passed on and settled, it will of course much abridge the extent of inquiry in any subsequent trial. We cannot, in the absence of what is claimed to be a regular decree, determine its character or sufficiency. To prevent misunderstanding, we will say the first item of the first account is for \$1,480, cash on hand. The passage of this account would not prevent the appellants from showing there was cash on hand at death of testator other than or beyond the \$1,480.

The next item is \$3,573.75, rents. The passage of this account, with this item, does not preclude the appellants from showing that the executors may have received other rent, or rents, to a greater amount than \$3,573.75. These are mere admissions of a general result, and do not purport to be items of account presented in proper form for adjudication of the Court.

With regard to the third item, \$1,295.47, received from the settlement of partnership business, it is evident this also is the mere result of other accounts. It is not an account in such form as could properly be presented for settlement. The Court may properly go into an investigation of the accounts which produced this result, unless there was a former settlement with the Probate Court, and this is the balance found on that settlement. In the absence of such settlement, the Court may go back to the start, ascertain what amount of partnership property came into the hands of the execu-

tors, how they disposed of it, and what were the legitimate expenses to be deducted.

In regard to the items of expenditure for the estate as charged in this account, with the exception of the last item, \$294.12½, they are all of such a character as might legitimately have been paid by the executors. And if it appears that this account was regularly passed on, the law supposes satisfactory proof as to the payment of each item was made, and they are not the subject of investigation in this proceeding. If there was fraud, as insisted by appellants, in the charges for funeral expenses, etc., that must be reached by another proceeding.

As to the last item in this account, charged against the estate as money advanced, without any specification as to when, where, or for what advanced, we think it was error to allow it on such a vague statement. The executor should still be required to show for what this was paid and allowed, be such portion of it as they can show was properly expended.

In the beginning of the second account is a repetition of certain charges against the estate to the amount of \$751, which were contained in the first account. We think the accounts themselves clearly show this error, and it is admitted by the executors. This can be corrected in the next settlement.

The intention of this Court in requiring the executors to file new accounts making a full showing of all the property and assets that have come to their hands, etc., was to have them file a statement, first, of the amount and value of the jewelry, watch, etc., which it is admitted came to the hands of the executors, or one of them, and was never placed in any inventory or account of the estate. Another was, to make them show the amount of partnership property which belonged to decedent, and the particulars as to the manner of disposing thereof, and the expenses of closing the partnership affairs, instead of merely returning the general result as netting \$1,295.47. So, too, instead of the general return of \$3,573.75 for rents for the first term of — months, the petitioners are entitled to an account of the items making up that general result.

It was not the intention of this Court to require that which had once been properly passed on to be reopened. With regard to the

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amount paid for the purchase of an adverse claim to the real estate held as tenants in common by Medin and Milinovich the deceased, we will repeat: as the executor chose to compromise this suit and buy in the outstanding title without asking leave of the Probate Court, (which was the only legal course he could have taken as executor) he must be deemed to have acted in that purchase not as executor, but as a tenant in common. Having then purchased in the estate as a tenant in common, his purchase inures to the benefit of all his cotenants unless they, upon a proper offer made to them, refuse to sanction the purchase and contribute their share of the purchase or compromise money. We have already said this is a matter which cannot be settled in a Probate Court. The parties must either settle this matter between themselves, or resort to the equity side of the Court to settle the difficulty.

It is claimed that petitioners have ratified this purchase by accepting the rents, etc. We can see no evidence of ratification in this. Respondents came into possession of one-third of the estate as representatives of deceased. They can no more deny the title of deceased than a tenant can deny the title of his landlord. Upon the mere *ipse dixit* of the executors or their counsel that the adverse title bought in is a better one than that under which they formerly held, the executors cannot retain the share of rents belonging to the deceased. But we do not understand that petitioners wish to renounce the benefit of the purchase. They seem willing to pay their portion of the purchase money. The dispute is as to what was legitimately paid. The amount paid to the real holders of the adverse title is not questioned. Petitioners only question the propriety of large payments made, as they claim, unnecessarily, if made at all, to parties who neither had nor claimed to have any title to the property. The Probate Court can neither investigate the facts as to whether these outside payments were or were not made, and if made, whether made rightfully or without necessity and wrongfully. If the parties cannot settle this matter between themselves, it must be settled in another Court. In the meantime the rents must be accounted for by the executors.

This Court ordered the interest items to be struck out, because

it is unlawful for an executor (unless authorized by will) to borrow money for an estate. No state of proof could have justified the allowance of these items, therefore they were improperly allowed; and that is one of that class of errors which the Court may correct before final decree.

Counsel complain that whilst the Court fails to find fraud against the executor, it still uses many expressions calculated to place him before the community in a very unfavorable light. The Court, in its opinion, did intend to refrain from any expression of opinion as to the charge of fraud, but at the same time intended to express in language not to be misunderstood its disapproval of the reckless and wasteful manner in which this estate was managed, the utter disregard of law shown in every step of the management, from the death of the deceased to the commencement of this proceeding. It is the intention of this Court, so far as in its power, to put a stop to the waste and destruction of the estates of deceased persons; and we shall not hesitate to express our views of the law because it may injure the feelings of some executor or administrator who thinks that he is only following the common custom of the country, and therefore perfectly justifiable in squandering the estate that may come to his hands.

We again repeat what we said in our former opinion: that extravagance, waste and mismanagement of an estate afford the same ground for removal of an executor as absolute fraud.

A rehearing is denied, but the judgment is so modified as to direct the Court below to conform in its future proceedings to the views as expressed in the former opinion, and as modified in this response to the petition for a rehearing.

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MARY ANN REED, RESPONDENT, v. AUGUSTUS ASH
ET AL., APPELLANTS.

Are the sureties on a Constable's bond liable for a trespass committed by him under color of process? And if so, is the liability primary, or are they only answerable after the liability of the Constable has been fixed by judgment?

When R loaned money to M for the purchase of cattle, with an agreement that R was to have a lien on all the cattle purchased until her loan was repaid, this does not vest any title to the cattle in R, as they are purchased. Her lien in such case could only be made good by taking possession before attachment by other creditors.

APPEALED from the First Judicial District Court, Hon. CALEB BURBANK, presiding.

W. C. Wallace, for Appellants.

Our statute does not authorize the bringing of any suit on a Constable's bonds: consequently, whatever are the liabilities of the Constable and sureties, are fixed by the rules of the common law.

The sureties in the bond only undertake that the officer will faithfully perform the duties of his office. They do not undertake to indemnify those against whom the officer has no process, that he will not trespass on their property.

The complaint in this case avers a general property in plaintiff, but does not show either the possession or right of possession in plaintiff when the alleged trespass was committed. McMillan may have had a special property in the articles sold subject to execution.

I find cases cited where officers have been sued in trespass, trover and replevin, for property seized under color of office, and upon recovery of judgment and failure to make the same the sureties have been held liable. But I find no reported case where an officer and his sureties have been held liable in an action of this kind on the official bond.

The lien of plaintiff, although good as to McMillan, was void as to creditors, because the possession of the property remained with McMillan.

Pitzer & Keyser, for Respondent.

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The action was brought properly on the official bond, without any previous action against the officer. (*Van Pelt v. Littler*, 14 Cal. 196.)

The allegation of title in the plaintiff, and that her property was taken and sold to satisfy an execution against McMillan, was sufficient. No averment of possession was necessary.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

This was an action brought by plaintiff against the defendant Ash and his sureties on a Constable's bond. The substance of the complaint is, that Ash having in his hands process legally issued against one McMillan had, whilst acting under color of such process, seized and sold three yoke of oxen, the property of plaintiff; that this unlawful seizure of the property of plaintiff, under color of process, was a breach of his official bond, whereby he and his sureties became liable to plaintiff for the damages resulting from the unlawful seizure.

The defendants justified under the suit, and alleged the property to be that of defendant in execution, McMillan. The cause was tried before a jury, and they found for the plaintiff.

The defendants gave notice of motion for a new trial, and made the statement and motion in due time. The Court below overruled the motion, and defendants appeal.

The first point made by defendants is, that plaintiff has mistaken her remedy. That the act of the Constable, if unlawful, was simply a trespass against the plaintiff, and her remedy was only by trespass or trover against the Constable. That if the sureties were liable at all, it was not a primary liability, but one which could only arise after judgment against the Constable in trespass or trover, and an inability to make the judgment by execution. Upon this point the authorities are certainly contradictory, and for this case it is not necessary to decide the point. The evidence was totally insufficient to sustain the verdict. The facts, as shown by the plaintiff's own testimony, were these: About the sixteenth of October, 1865, plaintiff loaned McMillan \$200, at an interest of two per cent. per month. On the 28th of October, she loaned him \$300 or \$350 more, (she says \$350, McMillan says \$300) on condition

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that McMillan should lay out the money in cattle, and give them to her as security for the money loaned. On the same day McMillan bought one yoke of cattle and returned to plaintiff \$200 of the borrowed money. On the twenty-ninth, he again got the \$200 which he had returned the evening before, and with that and \$100 borrowed from another source, bought a wagon and two more yoke of cattle. Neither of these purchases were made by McMillan in person. The first yoke of cattle was bought by a man named Arnett, who was in McMillan's employ. McMillan gave him the money to buy them. He knew nothing of where the money came from. He acted solely as the agent of McMillan. He took the bill of sale in his own name, but delivered that and the cattle to McMillan. A man named Coughlin, also in the employ of McMillan, bought the other two yoke of cattle and the wagon for McMillan. McMillan furnished him \$200 of the money, telling him he got it of Mrs. Reed, (the plaintiff) and Coughlin says the other \$100 he himself advanced. After the cattle and wagon were all purchased, McMillan showed them to plaintiff, and said to her "they were her property until I paid her." The plaintiff herself gives the following account of the transaction: "I know McMillan and Coughlin. I let McMillan have \$350 on the 28th of October, 1865. I let him have \$200 the next day. He returned \$200 of the \$350 the first night. He said he wanted to buy some cattle. I gave him the money on the conditions that he gave me the cattle for security. He bought cattle, and in a day or two bought two yoke of cattle, and afterwards showed me the three yoke of cattle and a wagon, and said, 'Look at your property.'" From that time until the cattle were seized by the Constable for the debt of McMillan, they were exclusively under the control of McMillan, his employés, or persons whom he took in temporarily as partners.

Respondent contends that this shows a purchase of the cattle by McMillan as the agent of the plaintiff; that the title of the cattle when purchased vested in plaintiff, and that there was only a contract between plaintiff and McMillan allowing him to buy the cattle when he got the money to do so.

We cannot view the contract in that light if we are to believe either McMillan or the plaintiff. They both speak of the transac-

tion as a *loan*. The plaintiff says she loaned the money on the condition that McMillan would give her "the cattle for security." Now, if the cattle were hers when purchased, how could McMillan give them to her as security?

Had Mrs. Reed furnished money to McMillan to buy cattle *for her*, with a distinct agreement that McMillan might use the cattle with the privilege of buying them at any time he got the money, such contract would not have been affected by the Statute of Frauds. The possession of McMillan would not have been inconsistent with the title of plaintiff. Had the cattle died, the loss would have been hers. No debt would have existed in such case from McMillan to her. But the actual contract proved was far different. The proof as made by the plaintiff herself is, that she loaned the money. She did not buy the cattle, but merely had a verbal contract with McMillan that he should give her security on the cattle. This was a good contract as between them; and if the cattle had been delivered to plaintiff under this contract, and she had retained the possession, at any time before levy, that possession would have protected her. But until there was an actual delivery under her contract, she had no security which would avail against an attaching creditor. Nor, if there had been an actual delivery, would her security have held good one hour longer than she retained possession.

The Court below seems to have formed its instructions on the theory that if the money was loaned only on condition that it should be expended for cattle, and that when the cattle were purchased that plaintiff should have a lien on them, she would have the same right to the cattle that she would have had if they had been bought for her in her name, and with a mere contract on her part to sell to McMillan in the event of his being able and willing to buy. This was certainly an erroneous view of the case. The making of an agreement before the loan of the money for security on the cattle was no more effectual to secure the plaintiff than the execution of a mortgage after the purchase would have been. If they were McMillan's cattle, in order to secure plaintiff she must have obtained possession before any other lien attached. It is not pretended she had any possession when they were attached.

The judgment must be reversed, and a new trial ordered.

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L. FEUSIER ET AL., RESPONDENTS, v. R. G. SNEATH,
APPELLANT.

Parol evidence cannot be heard to prove that a bill of sale, (under seal) absolute on its face, was intended merely as an assignment in trust for the benefit of grantor's creditors, unless in case of fraud or mistake.

Parol evidence that an absolute deed for land was intended as a deed in trust for grantor's creditors, is liable to two objections: first, the same as that in regard to the bill of sale under seal; second, it would be establishing a trust by parol, which is in violation of the 6th section of the Statute of Frauds of California, where the land is located.

If the bill of sale and conveyance of the land were procured by fraudulent representations that they would be held in trust for all the creditors, these fraudulent representations might be proved, and a trust would thereby be established.

In an equity case, this Court may order the proper decree to be entered in the Court below without the formality of a new trial.

UPON REHEARING.—The unsupported testimony of one of the contracting parties to a sealed instrument can in no case be sufficient to establish fraud in proving the execution of the instrument.

The rule that an Appellate Court will not disturb the judgment of a *nisi prius* Court founded on the verdict of a jury where there is conflicting testimony, has no application to Chancery cases tried without a jury. More especially is this the case when all the important testimony is contained in depositions. This Court is as competent to determine the weight and effect to be given to written testimony as the Court below.

To prove that a deed, absolute on its face, was given as a deed in trust, is not to prove a new and distinct contract, but is to vary and contradict the terms of the deed.

The rule that a deed, absolute on its face, may be proved to have been given as a mortgage, is an exception to the general rule, rests on peculiar reasons, and the proof to be introduced is of a peculiar nature.

Courts of Equity may inquire into the objects which induced parties to enter into contracts, and may prevent a fraudulent use being made of them.

When there is an attempt to show that the object of a deed is different from that expressed on its face, the proof must be clear and conclusive; and there must also be satisfactory evidence that one of the parties has committed, or is attempting to commit some fraud, before the Court will interfere.

APPEALED from the District Court of the First Judicial District,
Hon. RICHARD RISING, presiding.

Hillyer & Whitman, for Appellant, made the following points:

1st. The Court should have sustained the demurrer, because the complaint shows no assent to the assignment by plaintiffs, and no demand until after distribution. (2 Story's Eq., Sec. 1036, a.)

2d. The Court erred in its judgment for the same reason. If the assignment was as claimed by plaintiffs, it was revocable by Bolan & Sneath until distribution had been made; unless the creditors assented, and unless the assignee acted as directed, no such revocation was had, and therefore the distribution became absolute. (2 Story's Eq., Sec. 1036, b.)

3d. The gist of the complaint is the conversion of moneys by defendant. There is no conflict of evidence on this point. All moneys coming into the hands of defendant were paid out by him. Therefore, plaintiffs should not have recovered, and the Court erred in so adjudging.

4th. The findings of fact of the Court are not warranted by the evidence or pleadings, or either.

5th. If there was any such agreement as claimed by the plaintiffs it was in parol, and therefore void. (Statutes 1861, Secs. 70-71.) The Court erred in not ruling out all testimony on this point; in not granting a nonsuit; in considering such testimony, and in its findings and judgment.

W. L. Hoover & F. W. Cole, for Respondents, made the following points:

1. The assent of creditors to an assignment is presumed until the contrary is shown. The complaint states that demand was made of defendant after the proceeds of the sale were collected and a dividend declared. (Burrill on Assignments, 308-317 and 325; *Brooks v. Marbury*, 11 Wheaton, 78; *Nicoll v. Mumford*, 4 John. Ch. 522.) As to the question of demand, see Burrill on Assignments, 482 and 524.

2. It was unnecessary to allege in the complaint that the assignment was not revoked. That is a matter which defendant should set up in his answer as a defense, and both the pleadings and the testimony in the case show the assignment never was revoked.

3. The gist of the complaint is to recover the proportionate share of the plaintiffs and their assignors in the proceeds of the sales of the property assigned and withheld from them by the defendant. (Burrill on Assignments, 539, and cases cited.)

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4. The Statutes of 1861, cited by appellant's counsel, are not applicable to the case at bar.

1. Sec. 71 of the Act of 1861 concerning conveyances, reads: "Every grant or assignment of any *existing* trust in lands, goods, etc., shall be void, etc." There is no grant or assignment of an existing trust in this case. (Browne on Statute of Frauds, 101.)

2. The statutes do not extend to declarations of trust of personal property. (Story's Eq. Jur., Sec. 972; Willard's Eq. 413; Hill on Trustees, 57; *Gray v. Thompson*, 1 Johns. Ch. 82; *Day v. Roth*, 18 N. Y. Rep. 448.)

3. The statutes have no reference to trusts created by the operation of law. (4 Kent's Com. 305; Hill on Trustees, 59; *Harrison v. McMenomy*, 4 Edwards Ch. 251; *Letcher v. Letcher's Heirs*, 4 J. J. Marshall, 590; *Hosford v. Mervin*, 5 Barb. 57.)

4. The transfer of the property assigned was made in writing, and the declaration of trust by parol. (Burrill on Assignments, 88-89, 139-229, and cases cited; 1 Greenleaf's Ev. 375; *Lewis v. Gray*, 1 Mass. Rep. 297; *McRea v. Purmort*, 16 Wend. 475.)

5. The defendant in his answer admits the trust. (2 Paige, 177.)

5. The judgment of the Court below is warranted by the evidence, and should be affirmed. The testimony in the Court below was somewhat conflicting, but this Court will not review conflicting testimony.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

The plaintiffs filed a complaint in the nature of a bill in equity, setting up substantially the following state of facts: In November, 1864, James Bolan & Co., being merchants, either insolvent or in failing circumstances, made an assignment to defendant, one of their creditors, of all their effects. In January following James Bolan, to carry out the purpose of the assignment, executed a deed to defendant for a piece of real estate in California. Said assignment was made in trust that defendant would sell the property,

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etc., and pay all the creditors of Bolan & Co. *pro rata*. Plaintiffs further aver that defendant accepted the trust, and at the time of the creation of the trust plaintiffs and their assignors were among the creditors of Bolan & Co., to the extent of over two thousand dollars. That defendant went on to sell and collect the assets of Bolan & Co., and declared a dividend among the creditors. That after the dividend was declared plaintiff had notified defendant of his claims, and demanded his share of the dividends; but defendant had refused to pay the same, and had fraudulently converted plaintiff's share to his own use, etc., etc. Defendant denies that he ever received any assignment of the effects of Bolan & Co., otherwise than as an absolute sale and delivery. He denies the existence of any such trust as is alleged in the complaint; denies that the conveyance of the California property was in furtherance of any such trust as alleged in the complaint. He denies that he took or held the property in trust, as alleged in the complaint.

Defendant, after these denials, goes on to give his own version of the transaction. He says that, being the largest creditor of Bolan & Co., and knowing their embarrassed circumstances, he proposed to the other creditors to assign their claims to him for collection. The following named creditors did assign theirs as specified:

M. Wertheimer.....	\$ 68 55
John Naglee.....	447 02
M. Evans.....	24 75
W. L. Ross.....	87 91
Sullivan & Cashman.....	2,096 80
J. H. Cutter.....	683 23
G. Venard.....	175 00
Defendant's claim.....	2,591 02
Total.....	\$6,174 28

With these claims in hand he proceeded to negotiate with James Bolan & Co. for the purchase of their stock of goods, etc.; did make a purchase; and transferred to Bolan & Co. a sufficient amount of these claims, receipted in full, to cover the purchase.

He further says, after this transaction was completely closed, and the goods, etc., in his possession, he proposed to the present

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plaintiff and his assignors that they should also assign their claims to him, and he would do his best to collect them. That they declined because Bolan had some property in Virginia which had not been sold or assigned, and plaintiff and other Virginia creditors hoped to make their debts out of this property. Defendant then entered into further negotiations with Bolan to get other security for the balance of claims in his hands. That Bolan, being influenced by plaintiff, refused to enter into further negotiations, and he then attached the California property. After the attachment, Bolan deeded him the California property at a price much above its value. Defendant realized from the personal property, chose in action, and the California real estate \$4,346.54, which he distributed *pro rata* among the claims assigned to him.

These assigned claims he receipted in full and handed over to Bolan, who received them as full consideration for what he had sold or assigned to defendant. The case came on for trial, and the plaintiffs first introduced the following instrument:

“Know all men by these presents, that we, James Bolan & Co., of Virginia City, State of Nevada, merchants, for and in consideration of the sum of fifty-four hundred and twenty-five dollars, to us in hand paid by R. G. Sneath, of San Francisco, California, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained, sold, and delivered, and by these presents do bargain, sell, and deliver unto the said R. G. Sneath, all the goods, wares, merchandise, chattels, and effects mentioned and described in the schedule hereunto annexed and marked A, contained in the brick store, corner of B and Union Streets, Virginia City, together with the book accounts, notes, safes, horses and wagons, and all other personal property, whether mentioned in the above schedule A or not. To have and to hold the said goods and property unto the said R. G. Sneath, his executors, administrators, and assigns, to his and their own proper use and benefit forever; and we, the said James Bolan & Co., for ourselves and heirs, executors, and administrators, will warrant and defend the said bargained goods and property unto the said R. G. Sneath, his executors, administrators, and assigns, from and against all persons whomsoever.

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"In witness whereof, we have hereunto set our hands and seals this seventeenth day of November, 1864.

"JAMES BOLAN & Co. [Seal.]

"J. E. SMITH." [Seal.]

Then the plaintiff offered in evidence the deposition of J. E. Smith. Before the deposition was read, the defendants made the following objection to it :

"Defendant objects to all testimony, and all that class of testimony in the said deposition in relation to a parol trust, as incompetent and irrelevant: first, because it varies the contents of a written instrument; and secondly, because under the statutes of this State there can be no such thing as a trust under parol constituting a parol trust outside of a written agreement."

They also made the same objections to the deposition of James Bolan.

The depositions were read, and the Court below seems to have been guided almost exclusively by the testimony contained in these two depositions in the conclusions at which it arrived.

Whether the depositions should have been read or not, is, we think, rather problematical. If read, it could only be for one purpose, and that to establish fraud on the part of the defendant in procuring the bill of sale, above quoted. No evidence can be admitted for the purpose of engrafting a parol trust upon an instrument which purports to be an absolute gift (except in case of fraud or mistake). (See Hill on Trustees, page 60.) Here was an absolute bill of sale of certain chattels. "To have and to hold the said goods and property unto the said R. G. Sneath, his executors, administrators, and assigns, to his and their own proper use and benefit."

To attempt to prove that these goods, etc., were assigned in trust for the purposes claimed by plaintiff, is simply to attempt to contradict every material portion of the bill of sale. Such evidence was wholly inadmissible. The depositions objected to attempt to prove a parol agreement, simultaneous with the bill of sale, that the goods were to be disposed of and the proceeds held for *pro rata* distribution amongst all the creditors of Bolan & Co.

The evidence, so far as it relates to the bill of sale, was objection-

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able, not because of anything in our Statute of Frauds, but because it was in violation of an established common law rule that you cannot contradict, vary, or explain a deed by parol evidence.

In regard to real estate deeded in California, there would be two objections to admitting parol evidence to show it was deeded in trust. The one, the same as that to the bill of sale; the other, it would be in direct conflict with the sixth section of the Statute of Frauds of California (fifty-fifth section of our Act in regard to Conveyances) to permit a trust in lands to be established by parol. If, however, the defendant, by fraudulently promising to hold the proceeds of these goods for distribution *pro rata* among all the creditors, obtained this bill of sale and conveyance of the California real estate, then the law would hold him as a trustee for those for whose benefit Bolan and his partner supposed they were making the sale and conveyance.

If then the evidence to which we have alluded was admissible, it was only so to prove fraud. Fraud is not properly set up in the complaint; indeed, the complaint is perhaps equally defective in other respects. But if the evidence made out a case of any kind for the plaintiffs, we would probably send it back with leave to amend. We will then examine the evidence and give to it that consideration to which it would be entitled if the complaint was properly drawn to meet the evidence.

In our opinion, the evidence utterly fails to show fraud. The first contract and bill of sale were made in San Francisco. No one was present but Bolan, the defendant, defendant's clerks and a Mr. Sullivan, who was one of the defendant's assignors. Of all those who were present, Bolan alone is called on by the plaintiffs to prove the circumstances of the transaction. He states the transaction in such a way as to present the conduct of the defendant in a very unfavorable light. If we were to take all Bolan says as strictly true, perhaps we would be forced to the conclusion that the conduct of the defendant was fraudulent, and be compelled to hold that there was a resulting trust arising from that fraudulent conduct in favor of plaintiff. But there is not a particle of evidence corroborating the statement of Bolan. His statement directly contradicts the written and sealed instrument which he executed. What

Bolan said to his partner Smith, in Virginia, after he had executed the instrument in San Francisco, is certainly entitled to no consideration. Defendant had nothing to do with that. Bolan may have made any number of false statements to Smith, and that could not affect defendant, if he had nothing to do with his statements.

Defendant himself is called as a witness; his statement accords with and does not contradict the writing. He produces the written memorandum of Bolan, showing that according to Bolan's own estimate the *firm* was insolvent; but that Bolan's individual property, which was nearly all in Virginia City, would more than pay all debts left unpaid after the firm assets were exhausted. The defendant says that whilst he took the bill of sale to secure the debts he then represented, to wit: his own debt and some San Francisco debts which were assigned to him, and which he immediately receipted and handed over to Bolan, he did agree that if Bolan would assign to him his individual property in Virginia, he would act as the common agent of all the creditors, and divide the proceeds *pro rata* among them all. The testimony abundantly proves that he did attempt to carry out this agreement. He tried to get the Virginia claims assigned to him. This, one of the plaintiffs, L. Feusier, proves. And the reason why the Virginia creditors would not assign to him was, that they were in doubt as to whether they would do best to assign their claims to defendant or to look to the individual property of Bolan. Under the law as it then stood, the Virginia creditors could have attached Bolan's property, whilst the San Francisco creditors could not. Now, it is rather improbable that Sneath, representing at the time the San Francisco creditors, and those only, would have taken property confessedly insufficient to pay the debts of Bolan & Co., and receipted those debts in full, which he then represented, and at the same time agreed to divide what he had with the Virginia creditors, leaving Bolan's individual property untouched. Bolan represented his Virginia property as more than adequate to pay all his Virginia debts. Sneath, governed by these representations, was, of course, willing to take all the property, and let all the creditors come in *pro rata*.

Sneath's testimony is not only sustained by the bill of sale, but in reality by all the surrounding circumstances. If the facts stated

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in a sealed instrument may be contradicted and the deed set aside and declared void merely on the testimony of one of the contracting parties, who says the facts did not exist as stated in the instrument, then there is no safety in entering into contracts.

In this case, there was no evidence justifying the Court below in arriving at a conclusion that defendant held the goods sold by Bolan & Co. in any other way than as the bill of sale (which was under seal) says they shall be held.

That the defendant did in good faith try to carry out his agreement to get Bolan to assign the Virginia property to him, and did try to get the Virginia claims all assigned to himself, is beyond question. Both Feusier and Forestill, who are interested in those claims, admit they were solicited to assign their claims and failed to do so. They hesitated about doing so until Bolan's Virginia property had all disappeared or been swallowed up in some way. Some of the Virginia creditors did assign, and defendant let them in for a *pro rata* dividend. Had the present plaintiffs done the same thing, they would probably have fared the same. Had the Virginia claims been promptly transferred to Sneath, he might have attached Bolan's property then, if he had refused to make the assignment.

The plaintiffs seem to have lost their debts by hesitation and delay. We see no evidence, except the insufficient testimony of Bolan, to prove fraud or misconduct on the part of Sneath.

This is an equity case, and as such it is within the province of this Court, in a proper case, to direct what decree shall be entered in the Court below. As in this case there is not the slightest doubt what the decree should have been, or what it ought to be, without putting the parties to the expense of a new trial, we will finally dispose of the case.

The judgment of the Court below must be reversed, and a judgment for costs entered in favor of defendant; and the Court below is so directed.

RESPONSE TO PETITION FOR REHEARING.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

The petition for rehearing is principally devoted to a review of the evidence. In this review counsel attempt to show some discrepancies between the answer of defendant, Sneath, and his testimony on the stand.

Admitting the discrepancies to be as great and irreconcilable as counsel claim—even admitting that the discrepancies in defendant's answer and evidence were so great as totally to discredit him—it would not; in our opinion, alter the result in this case.

If two parties should contract, under seal, and one of these parties should attempt to show fraud in procuring his signature to the deed by his own simple testimony, unsupported by circumstances, and the other party to the deed should deny all fraud or imposition, we doubt if any Court would be justified in setting aside such deed, although the plaintiff might be a man of the highest standing, and the defendant the greatest criminal in the community.

But we do not agree with counsel in the estimate which should be put on Sneath's testimony. The most apparent discrepancy in the answer and testimony of Sneath is in regard to the claims he had assigned to him before he entered into negotiations with Bolan. He swears in his answer that, with claims in hand to the amount of \$6,178.28, including his own, he entered into negotiations with Bolan, purchased the goods from him, and receipted claims to the amount of \$5,422. In his testimony, it turns out that the claims in his hands at that time amounted to only \$5,549.05, exclusive of interest, which perhaps would have added some hundreds more to the amount. Subsequently there were four small claims assigned to him, which in the aggregate amounted to \$627.66. Now it appears to us, the having stated in his answer that all these claims were in hand when he entered into negotiations, shows only negligence and want of care in making his statement. It does not indicate any intention to falsely represent the facts, for he would have made just as strong a case for himself if he had said he entered into the negotiation with claims on hand to the amount of \$5,549 as he does by

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saying the claims amounted to \$6,178.28. In his answer he seems carelessly to have included in the amount of accounts alleged to have been in his possession when the negotiation commenced four small accounts, which were subsequently assigned him. But it seems clear that he had in his hands, at the commencement of the negotiation with Bolan, accounts to an amount greater than the consideration mentioned in the bill of sale. Counsel point out some other apparent discrepancies, which we think equally unimportant. The bill of sale declares that the sale was made "to have and to hold the said goods and property unto the said R. G. Sneath, his executors, administrators and assigns, to his and their own proper use and benefit forever." Now, if the goods, etc., were assigned to pay only such claims as were then assigned to Sneath, it was legally for "his own proper use and benefit," for these claims were legally his. But if the assignment was generally for the benefit of all Bolan & Co.'s creditors, then it was not for the "proper use and benefit of Sneath."

To make this an assignment in trust, it was necessary to contradict the deed. This could not be done directly by showing that it was the intention of the parties that the deed, which was absolute on its face, should only operate as an assignment in trust. But if it could be shown under proper pleadings that Sneath had induced Bolan to sign the absolute bill of sale by *fraudulently* representing to him that under that bill of sale all the creditors would be entitled, or would be allowed to come in for their *pro rata* share of the proceeds, then the law would raise a trust in favor of the other creditors. But, as we have heretofore in effect said, the sole testimony of Bolan, unsupported by circumstances, cannot establish that fraud in the face of his own deed, which clearly expresses the purpose for which it was given; and, in opposition to the testimony of Sneath, who says the deed was given for the purposes mentioned on its face, and utterly denies any promise on his part to hold those goods in trust for any person; but, on the contrary, states positively he held them to satisfy certain claims which were legally his own, having been assigned to him.

The only circumstance tending to corroborate Bolan in his statement, and which is proved by another witness than himself, is this:

his partner Smith says that when Bolan asked him to sign the bill of sale, in the presence of A. L. Edwards, (Sneath's agent) he stated the assignment was made to pay all the creditors *pro rata*. But Smith does not even assert that Edwards heard this remark, but admits Bolan may have taken him aside to say this. Then, as we said in our original opinion, this is simply the declaration of Bolan, and is entitled to very little, if any weight, in supporting his version of the transaction.

The rule that an Appellate Court will not disturb a judgment founded on a verdict where the testimony is conflicting, does not apply to a Chancery case tried by the Court without a jury. More especially, if the finding of the Court below is based on testimony contained in depositions, will this Court look into the testimony as if it were an entirely new case. There is no reason why this Court may not judge as well as the Court below of the weight and effect to be given to depositions.

To prove that a deed absolute on its face was given in trust for other purposes than those mentioned in the deed, is not to prove a new and distinct contract, but to vary and contradict the terms of the deed, which is inadmissible.

There is nothing in the case of *Pierce v. Robinson*, 13 Cal., which conflicts with these views. That case decides, on ample authority, that when a deed is absolute on its face, it may still be proved that the real transaction was intended as a mortgage to secure a debt. But these decisions are really based on an exception to, or qualification of, a general rule. In such case, the nominal vendor is allowed to show not what was said about the intention of the parties, the object of the deed, etc., but is allowed to prove the distinct and substantive fact that he was in debt to the nominal vendor at the time he made the deed, either on some past transaction or for some credit given at that time, and that the debt still exists. If these facts are proved, the law declares that the deed shall only operate as a mortgage. In other words, the law under such circumstances gives the vendor an equity in spite of his contract to the contrary.

But the rule in regard to mortgages is peculiar, and does not apply to other instruments.

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That Courts of Equity may inquire into the object which induced parties to enter into contracts, and may restrain a party from making fraudulent use of a contract, we have no doubt. But when it is attempted to show that the object which induced the execution of a deed is wholly different from that expressed on its face, then the proof must be clear and satisfactory; for the law will presume that the deed expresses the real transaction between the parties. Not only must it appear that the deed was intended to take effect differently from what is expressed on its face, but it must appear that one of the parties is making some fraudulent use of the deed, before a Court of Equity can interfere in the matter. Under all ordinary circumstances, when a man deliberately enters into a contract under seal, he must abide by the letter of the deed. If it could have been shown here by competent proof that Sneath induced Bolan to make this absolute bill of sale by promising to hold the goods in trust for all the creditors, and that he afterwards converted the goods to his own exclusive use, this would have been fraud. A trust would have arisen in favor of other creditors of Bolan, and relief might have been granted. But the evidence offered was wholly insufficient to establish these facts in opposition to the force of the deed.

A rehearing is denied.

LUCINDA ALCALDA, APPELLANT, v. HERMAN MORALES, RESPONDENT.

Where a bond is drawn up in California, and there signed and sealed by one obligor, and then sent to this State to be signed and sealed by the remaining obligor, the finishing act in the execution of the bond having been done in this State, it must be held in regard to the Statute of Limitations as a bond executed in this State, and not in another State.

The terms and form of a bond having been previously assented to, and the consideration paid by the obligee, it must be considered as having been delivered as soon as placed in any public conveyance, or in the hands of any person to be delivered to the obligee.

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Where the vendee of goods, in consideration of the sale, undertakes to pay certain debts to the creditors of the vendor, this is not undertaking to answer for the debt or default of another, but only to pay his own debt in a particular manner.

APPEAL from the First Judicial District Court, Storey County,
Hon. RICHARD RISING, presiding.

Pitzer & Keyser, for Appellant.

It was error to compel plaintiff to introduce note of Ramirez & Arrieta. This was a new debt to plaintiff, and on a new consideration. The old note could cut no figure in the case.

Admitting the note from Ramirez & Arrieta was barred by the Statute of Limitations, that was no bar to the separate and distinct undertaking of defendant to pay this debt to plaintiff. (*Whiting v. Clark*, 17 Cal. 407; *Lord v. Morris*, 18 Cal. 490.) Ramirez & Arrieta did not choose to avail themselves of the Statute of Limitations, but placed goods in the hands of defendant to pay the debt of plaintiff.

Defendant having received the consideration to pay this debt, cannot set up the statute, which has only run in favor of the original obligees.

The advertisement of dissolution, etc., which was signed by defendant, was a writing sufficient to take this case out of the operation of the Statute of Limitations, when taken in connection with the oral proof offered by the appellant, and the Court erred in rejecting that proof.

The final act in the execution of this note having been performed in this State, it must be treated as a domestic note, and it was not barred by the Statute of Limitations. (*Read v. Edwards*, 2 Nev. 262.)

Aldrich & DeLong, for Respondent.

The note from Ramirez & Arrieta was the foundation of this whole claim, and was therefore properly required to be introduced.

The proof only shows that defendant undertook to pay the debts of Ramirez & Co.: it is not sufficient to show a special undertaking to pay this particular debt. Being only a general undertaking to

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pay the debts of the late firm of Ramirez & Co., defendant could avail himself of every defense of which that firm could have availed itself.

The question as to whether this note shall be treated as a domestic note, or one made out of the State, depends on when the note was delivered. The note being dated and made payable in California is, *prima facie*, a California note. There is no proof to overcome this *prima facie* evidence of its being a California note. It is proved that one of the makers signed it in California, but there is no proof as to where or how it was delivered, consequently the note must be treated as its face would indicate it to be, a California note.

There was no privity of contract between plaintiff and defendant, and therefore this action cannot be maintained.

This is an attempt to make defendant answerable for the debt of another, without any written evidence of a promise to pay, and is therefore within the Statute of Frauds, and the promise is void.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

The facts presented in this case are as follows: In the month of December, 1864, José Ramirez and Jesus Arrieta were doing business as partners in Virginia City, Nevada Territory, under the style of Ramirez & Co. Ramirez went to Sacramento, California, to borrow money for their business. He negotiated a loan with the plaintiff. The following instrument was drawn up in Sacramento:

“SACRAMENTO CITY, Dec. 13, 1864.

\$500. Eight months after date, for value received, we jointly and severally promise to pay to Lucinda Alcalda or order the sum of five hundred (\$500) dollars in gold coin of the United States of America, at her dwelling house in the city of Sacramento, California, with interest thereon in gold coin aforesaid at the rate of two per cent. per month from date until paid. The interest to be paid monthly in advance.

{ ^{10 cent}
U. S. Stamp. }

JOSE RAMIREZ, [L.S.]

JESUS ARRIETA. [L.S.]”

Ramirez signed it in Sacramento and obtained the money. The

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instrument was then sent to Virginia City, executed by Arrieta and returned to plaintiff.

In October, 1865, the present defendant bought out the interest of Arrieta, which was one-half, in the firm of Ramirez & Co., and as part consideration of that purchase assumed to pay half the debts of the old firm, among which was this obligation to plaintiff. The business was continued in the name of Ramirez & Co. In October, 1866, defendant bought out Ramirez, and as part of the consideration assumed to pay all the debts of Ramirez & Co., among which was this obligation to plaintiff. Soon after the defendant became sole successor to the business of Ramirez & Co., plaintiff demanded payment of her obligation, and upon refusal on his part to pay, she brought this suit.

The foregoing facts being proved on the trial of the case, defendant moved to strike out the testimony in regard to his having assumed to pay all the debts of Ramirez & Co., because it was seeking to make him responsible for the debt of another, when the evidence of such promise was not contained in any writing. This the Court refused to do. Then upon the close of the testimony the defendant moved for a nonsuit on the ground that the debt from Ramirez & Arrieta was barred by the Statute of Limitations, which motion was sustained. The plaintiff moved for a new trial on a proper statement of the case, and now appeals to this Court from the order of the Court below overruling that motion.

Respondent in this Court attempts to sustain the action of the Court below, on three principal grounds. His first proposition is that he did not assume to pay this particular debt, but all the debts of Ramirez & Co., and that a fair construction of such a contract is nothing more than an undertaking to pay all the debts for which Ramirez & Co. were legally bound, which would not include debts barred by the Statute of Limitations; that this debt was so barred.

Whether the defendant was, under the contract proved, bound to pay a debt of Ramirez & Co. for which they themselves were not legally holden, owing to the running of the Statute of Limitations, it is perhaps not worth while to inquire. This debt, it appears to us, was not barred by the statute. The obligation given for the money is under seal. One of the parties executed the instrument

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by attaching his name and seal in the State of California; the other attached his name and seal in Nevada. It could not be held to be an executed instrument until the last seal was attached. That was the completion of the instrument. In contemplation of law an instrument cannot be said to be made or executed until completed. After the complete execution of an instrument it is still not binding until delivered. Our Statute of Limitations applying to instruments made out of the State, says: "Obtained, executed or made out of this Territory."

Now, the question is, could this obligation be said to have been *obtained, executed or made* out of the State of Nevada? It certainly was not *executed* out of the State, for the final act which consummated the bond was done in Virginia. But even after executed, it perhaps is not properly *made* until it is delivered. It certainly has not the binding effect of a bond or deed until delivered. But it seems to us the delivery of this bond must be held to have been made in Nevada. It was written in California, and signed by one of the obligors there. The money was loaned or advanced before the bond was finally executed. The execution was consummated in Virginia by the second obligor signing and sealing it there. After being signed and sealed by the second obligor it was sent to the obligee in Sacramento. It would seem that the moment the obligors gave it out of their hands (which was at Virginia) this made it a delivery. Usually, a bond must be accepted by the obligee before the delivery is completed; but where the obligee has paid the consideration for a bond already drawn up, which is to be executed and sent to him, we think there is a clear agreement to accept that bond when executed, and the delivery and acceptance both date from the moment that the bond is delivered by the obligor to some person or public conveyance to be taken to the obligee. If this bond was sent by mail or express, we think the delivery should be held to have been made when it was deposited in the office for transmission. If sent by an individual, the bearer must be treated as the agent of the obligee to accept the bond. In this view of the case, the delivery took place, according to the testimony, in the City of Virginia, in this State. The bond, then, was not at the trial of this case barred by the Statute of Limitations.

The respondent, in undertaking to pay all the debts of Ramirez & Co. in consideration of the purchase he was making, did not promise to answer for the "debt, default or miscarriage of another," but only agreed to pay *his own debt* in a particular manner. He owed a certain amount to Ramirez, and instead of paying that amount to the party from whom he purchased, he agreed to pay the same amount to a third party, to whom the vendor was indebted.

"The special promise to answer for the debt, default or miscarriage of another," spoken of in the statute, is a promise in the nature of a guarantee, and has no application to a case of this kind. The contracts of respondent, by which he first undertook to pay one-half of the debt due to plaintiff, and then to pay the other half, were contracts with which plaintiff had nothing to do. It is, therefore, reasonably objected that plaintiff, having had no connection with these contracts, cannot now maintain any action thereon for want of privity. Perhaps if we were to follow the strict principles and analogies of the common law, we would be forced to come to this conclusion.

In the English Courts there have been many conflicting decisions on this point. Some of the older cases hold that if A received something of value from B, in consideration of which he promised to pay a certain sum to C, C might maintain an action on such promise, although he had no agency in bringing about the promise. The modern English decisions, however, all hold a contrary doctrine. They all hold that a party cannot maintain an action on a contract made between third parties for his benefit, where he was not privy to the contract—that is, where he was not consulted, and did not become by his own assent a party to the contract when it was made. (See Chitty on Contracts, page 54 *et seq.*, and the English authorities cited in his notes.)

In the United States, a contrary doctrine seems to be firmly established in many of the States. There seems to be a decided inclination in this country to allow the party for whose benefit a contract is made to sue on it, although he may not have been a party assenting when the contract was made. This rule seems to be the most convenient one, as it frequently saves a multiplicity of actions. As it is sustained by ample authority, and we can see no

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possible evil to result from it, we are disposed to follow the American cases. (See 1 Parsons on Contracts, and authorities cited in note t, p. 390.)

The judgment of the Court below must be reversed, and a new trial ordered.

A. LOCKWOOD, RESPONDENT, v. THOMAS MARSH, APPELLANT.

When a case comes up on statement for a new trial which has never been settled by the Court or agreed to by the parties, this Court cannot look into the evidence and other matters set out in the statement; it will be confined to an examination of the judgment roll.

When A engages B to furnish money and buy up a mortgage against A, with an agreement that A will execute a new mortgage to secure the money advanced, and after the purchase of the old mortgage by B, A refuses to execute a new one to secure the money advanced, B may foreclose and enforce the old mortgage.

APPEALED from the First Judicial District Court, Hon. RICHARD RISING, presiding.

Aldrich & DeLong, for Respondent.

The statement never having been settled by the Court or agreed to by the parties, the Court can only look to the judgment roll and findings which support the judgment.

W. T. Barbour and *L. E. Bulkeley*, for Appellant.

The respondent never having proposed any amendments to appellant's statement, it is deemed an admitted statement, and no certificate of the Court is required.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

The appeal in this case is taken from the order of the District Court refusing a new trial, and also from a decree of foreclosure rendered in favor of the plaintiff. But as the statement on motion for new trial was never settled by the Judge below, nor agreed to by counsel, it is urged on behalf of respondent that this Court can

review no errors except those which may appear in the judgment roll; that if no error is apparent from that, the decree should be affirmed. There is certainly no doubt upon that point. Section 195 of the Civil Practice Act explicitly declares that "such statement, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be settled by the Judge upon notice." There is no evidence in the record before us that the statement prepared to be used on motion for new trial was ever agreed to by the adverse party, or settled by the Judge. Nor can we determine from the record, whether the Court below acted upon or considered the statement in overruling the motion. The statement not being agreed to or settled by the Judge as the law requires, and there being no statement on appeal, this Court is limited in its review to those errors, if there be any, which may appear on the judgment roll. To extend our inquiries beyond that, and to pass upon questions not raised upon the judgment roll, would be a clear violation of the section of the Practice Act above referred to. If therefore the pleadings are sufficient, and the decree is not inconsistent with them, and is supported by the findings, it must be affirmed.

The bill is filed for the purpose of obtaining a decree of foreclosure of a mortgage executed by the defendant to the assignor of the plaintiff. No question is made as to its sufficiency, and we are fully satisfied that it contains all the necessary allegations. The defendant's answer admits the execution and delivery of the note and mortgage, but denies that they were ever assigned to the plaintiff, or that he is the owner or holder thereof, or that he is indebted to the plaintiff therefor in the sum claimed in the complaint, or any other sum whatever. Then follows a detailed statement of the manner in which the plaintiff obtained possession of the note and mortgage sued on, the substance of which is that he was employed by the defendant to pay the note and to have the mortgage canceled: that after making such payment, the note and mortgage were delivered to him, but that instead of delivering them to the defendant, he claims to be the owner, and brings suit upon them.

The findings of the Judge below, however, exhibit a case differ-

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ing very materially from that presented by the answer. By his findings of fact, which are as follows, we must be governed in the disposition of this appeal:

First. "That the defendant made, executed and delivered the note and mortgage set forth and described in the complaint; that the same, at the time of the trial of this action, was unpaid, with the exception of the sum of five dollars paid thereon by the said defendant to plaintiff; that said mortgage is and constitutes a valid and existing lien upon the real property described in said lien."

Second. "That the said note was indorsed by the payee thereof, and sold and delivered with the mortgage to the plaintiff, who is now the owner and holder thereof, and the sum of two hundred and thirty dollars is due thereon from the defendant."

The substance of the third finding is, that the defendant requested the plaintiff to purchase the note and mortgage in question, and agreed with him that if he would do so, he, defendant, would make, execute and deliver to him a new note and a mortgage upon the premises covered by the old mortgage; and further promised to pay to the plaintiff interest on the sum of money so paid out by him at the rate of three per cent. per month. That after plaintiff had purchased the note and mortgage, and received an assignment thereof, the defendant refused and has ever since refused to execute and deliver to the plaintiff the new note and mortgage as agreed upon, and that the defendant has not paid, and that he refuses to pay the sum of money expended in the purchase of the note and mortgage upon which this suit is brought; that the defendant is indebted to the plaintiff on the note and mortgage set out in the complaint in the sum of \$230, with interest thereon at the rate of three per cent. per month since the 26th day of September, A.D. 1865.

Whether these findings of fact are supported by the evidence, is a question which cannot be determined upon in this appeal; they are not inconsistent with the issues raised by the pleadings, and are fully sufficient to sustain the decree of foreclosure and sale which was rendered upon them.

The Court finds the execution and delivery of the note and mortgage to Kingsbury, the purchase of the same by the plaintiff, and a

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regular assignment of them to him ; that the plaintiff is the owner and holder of them, and that there is due to him upon the same the sum of \$230 with interest.

These were all the facts necessary to support a decree in favor of the plaintiff. As there appears to be no error in the judgment roll which will authorize a reversal, the decree must be affirmed.

JOSEPH O'NEIL, RESPONDENT, v. NEW YORK AND SILVER PEAK MINING COMPANY, APPELLANT.

When an application is made for a continuance on the ground of the absence of a witness, it is certainly in the discretion, if it is not the absolute duty of the Court under our statute, to deny the application when the party opposing the motion will admit that the witness, if present, would swear to the facts as set out by the party applying for the continuance.

It is not error to allow a witness to say that defendant's agent agreed to give him an order of a certain character. To say that the agent did give him an order which he passed over to another party, was not proving the contents of a writing by parol. The witness did not attempt to prove the contents of the instrument, or even that he had read or knew its contents.

When A contracts to make a certain number of bricks for B, and deliver them to him at a certain price, B to select the spot where, and the clay out of which the bricks are to be manufactured: this is a contract rather for the manufacture than sale of brick, and does not come within the 62d section of Act in relation to Conveyances, &c., requiring contracts for the sale of goods to be delivered in future to be in writing.

Usually there is an implied warranty that an article manufactured for a certain purpose is fit for the use intended. But if the manufacturer is controlled as to the manner of construction and the material used by the person ordering the article, he is only bound for skill and diligence—he is not responsible for the result.

Where an affidavit was made on the fifth of October, stating the necessary facts to justify the issuance of an attachment, but was not filed until the sixteenth, on which day the attachment was issued: *held*, this was sufficient to justify the issuance of the writ. It having been shown that the debt was past due and unpaid on the fifth, the presumption of law is, it still remained so on the sixteenth, there being no showing to the contrary.

In cases of doubtful construction of statutes, the Courts will look to the effect to be produced by one or the other construction, and give a statute such effect as will be most beneficial.

Per LEWIS, J., *dissenting*.—The provisional remedies under our code are in deroga-

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tion of the common law, and the statute must be strictly followed. An affidavit that a debt is due eleven days before suit brought, is not conclusive that it is unpaid at the date of bringing the suit, and no presumption of law can be taken in lieu of the positive proof required to be offered by plaintiff's affidavit.

APPEALED from the District Court of the Eighth Judicial District, Hon. S. H. CHASE, presiding.

W. M. Seawell, for Appellant.

The attachment should have been dissolved. The affidavit of plaintiff shows a debt had been due from defendant eleven days previous to the issuing of the writ. It does not show any debt was due when the writ was issued.

The Court erred in refusing to grant a continuance to defendant.

The Court erred in refusing to strike out the evidence of plaintiff in relation to a written order, the order itself not being produced.

The testimony of Cobb should have been stricken out, because he speaks of a conversation he had with Catherwood about a contract he (Catherwood) had made with O'Neil. It is not shown that this contract was one made by Catherwood on behalf of defendant. The evidence does not sustain the contract as set forth in the complaint; and even if it did, is not the contract void, it being a mere verbal contract for the future delivery of goods?

Even if a lawful agreement for the brick was made, defendant was not bound to accept a worthless article.

J. H. Hardy, W. T. Gough, and Boring & Brown, for Respondents.

The order of the Court refusing to dissolve the attachment is not an appealable order, nor can it be reviewed on appeal from the final judgment, because it does not affect the merits of the case. (*Alexander v. Fitts et al.*, 24 Cal. 447.)

There is no defect in the affidavit in this case. It is not necessary the affidavit should be made at the moment of suing out the writ. It is sufficient if made within a reasonable time prior thereto.

The continuance was refused in strict accordance with the requirements of the statute.

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The statement of Catherwood about the order was properly admitted as part of the conversation in relation to the contract for bricks. There was no attempt to prove anything about the contents of the order, nor was it material to know what the order did or did not contain.

Although Cobb in his deposition speaks of a contract for brick made with Catherwood, yet other testimony shows it was the contract made by Catherwood as agent of defendant, and therefore was properly admitted.

This was not a contract to sell and deliver brick to defendant, but a contract to make brick at a certain yard for defendant.

The authorities make a marked distinction between contracts for the mere sale and delivery of goods, and contracts involving the expenditure of skill and labor in making articles which are the subject of contract.

This latter class of contracts is not within the 62d section of the Act in regard to Conveyances. (*Echelburger v. McCreely*, 5 Harr. & Johns. 238; *Bronson v. Wiman*, 10 Barb. S. C. 406; *Downs et al. v. Ross*, 23 Wend. 270; *Sewall v. Fitch*, 8 Cowen, 215; *Robertson v. Vaughan*, 5 Sand. 1; 1 Chitty on Contracts, 411.)

Opinion by BEATTY, C. J., JOHNSON, J., concurring, LEWIS, J., dissenting.

The plaintiff in this case brought suit against the defendant, a corporation, for the price of certain brick alleged to have been manufactured under the provisions of a special contract with the defendant. At the time of bringing suit the plaintiff also sued out an attachment against the defendant's property. The suit was commenced, and the attachment sued out on the sixteenth of October, 1866, but the affidavit of indebtedness, etc., had been made on the fifth of October, some eleven days before the suit was brought.

The answer of defendant denies having entered into the alleged contract, and on the trial defendant also relied on the 62d section of "An Act in regard to Conveyances, etc.," which provides that certain contracts for the sale of chattels shall be void, unless a note or memorandum of such contract shall be made in writing, etc.

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The defendant moved to quash the attachment, because it was irregularly issued on affidavit made some eleven days before the suit was commenced. This motion was overruled. The case was subsequently tried, and plaintiff had judgment. The defendant moved for a new trial, and failing in that motion, appealed to this Court from the order overruling both motions, and from the judgment.

When the cause was called for trial, the defendant's attorney submitted an affidavit showing the absence of a material witness and what he expected to prove by said witness. The affidavit was sufficient, so far as regards diligence, materiality and the likelihood of the witness being present within thirty days, the time for which a continuance was asked. The plaintiff consented to admit the absent witness would swear to the facts stated in the affidavit for continuance. Upon this admission, the Court refused a continuance, to which ruling defendant excepted.

We think, under the statute, the Court certainly had the discretion, if it was not an absolute duty, to deny the continuance under this state of facts.

The next point made by defendant is, that the Court refused to strike out a part of plaintiff's testimony, in which he states the contents of a certain written order (the order itself not being produced) given by the managing agent of the corporation to him.

There is no foundation for this exception. The testimony of plaintiff is, that the agent offered to give him an order of a certain character; that he took it and passed it to a certain party. He did not attempt to state the contents of the order. It could not be inferred from the evidence that he ever read the order. But the order was of no consequence, and whatever its contents, it did not affect the case in any way.

The evidence of W. A. B. Cobb was confirmatory of that of the plaintiff, and contradictory of that of Catherwood, a witness for defendant, and therefore was properly received by the Court.

The contract, as alleged and proved, was not a contract for the sale of brick, but a contract for the manufacture of brick for the defendant at a place and out of clay selected by defendant's agent. This case does not come within the provisions of the 62d section

of our Act in regard to Conveyances, etc., which requires contracts for the sale of goods to be delivered in future to be in writing. There has been considerable conflict of decisions as to whether a certain class of cases should be treated as contracts of sale or contracts for the manufacture of certain articles. For instance, if a miller, engaged regularly in the manufacture of flour, should contract to deliver the next hundred barrels of flour he may manufacture, it is rather difficult to determine whether such a contract is to be treated as a contract to manufacture one hundred barrels of flour or a contract to sell one hundred barrels. Probably, if the contract did not induce any change in the conduct of the miller, but he merely proceeded with his regular business, intending, under his contract, to deliver or sell the first product of his mill, this should be treated as a sale, because the manufacturer has not changed his condition, business or circumstances on account of the contract. But if he had contracted to manufacture and deliver some peculiar article out of the regular routine of his business—for instance, a hundred barrels of kiln-dried corn meal, requiring the purchase of new material and the introduction of new appliances for the drying of the corn, this undoubtedly would, under all the decisions, be held a contract not merely for the sale but rather for the manufacture of the corn meal, and not within the statute. So too this contract to manufacture brick, not at a regular brick-yard of plaintiff's, but at a spot selected by defendant, was a contract not of sale but of manufacture.

The fact that plaintiff placed in the kiln more brick than would fill his contract, made no difference. The main object and motive of the plaintiff was, if we are to believe his testimony, to carry out his contract. His having made more brick than his contract called for, whether it was for the purpose of being sure to have enough to fulfill the contract, or for the purpose of sale to others, could make no difference.

That part of Catherwood's testimony which related to a difficulty between plaintiff and Dr. Portz about fire brick was properly excluded. It has nothing to do with this case.

As a general rule, when a person undertakes to manufacture an article for a given purpose, there is an implied warrantee that it

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will answer the purpose for which it is manufactured. But when the party for whom an article is manufactured directs the mode of construction, or the material out of which the article is to be made, the workman is only responsible for skill on his part. He is not responsible for a defect in material; or the result of methods of construction which he does not control. In this case the same testimony which sustains the contract shows that the place of manufacture, and the clay out of which the brick were to be made, was selected by the defendant's agent. If, then, the brick made were worthless for the purpose intended, the workman was not responsible, unless for some fault on his part. Nothing was attempted to be shown on this head. There is no complaint that the brick were not well made, but merely that they were worthless as *fire brick*. This was most probably the result of the character of the clay used, and not of defective manufacture.

The instruction, that if the jury believed the brick were worthless they should find for defendant, was properly refused for several reasons. First—There was not a particle of proof to show that they were worthless for ordinary purposes. Second—It was not by any means satisfactorily proved that the bricks were ever expected or intended to be fire bricks by the contracting parties, and if they were, it was not shown that the failure in this respect was the plaintiff's fault. The testimony of plaintiff and of Catherwood are at issue on almost every point. If we believe the plaintiff, his case was fully made out. If, on the other hand, we believe Catherwood, plaintiff had no cause of action. Plaintiff is certainly corroborated, to some extent, by the testimony of Cobb. The jury seemed to have believed plaintiff, and there is no reason for disturbing the verdict.

The only remaining point to be considered is the action of the Court below in refusing to quash the attachment. Our law authorizes the plaintiff at the time of issuing summons, or at any time afterwards, to procure an attachment upon the filing of an affidavit showing the existence of certain facts when the attachment is applied for. The question is, did the affidavit, filed on the sixteenth of October, show the existence *on that day* of the debt sued for? Appellant contends that it did not. The affidavit, says

appellant, "only shows that such a debt did exist on the fifth of October, the day it was made." "Between the fifth and the sixteenth it might have been paid."

This is a rather embarrassing question. Greenleaf, in treating on the subject of legal presumption, (see Vol. 1st of Greenleaf on Evidence, Sec. 41) says: "When, therefore, the existence of a person, a personal relation or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." If we are to be guided by this rule, the affidavit having shown the debt to be existing and past due on the fifth of October, the legal presumption would follow that it remained due on the sixteenth of October. If a debt was shown to exist, but not due, after the day of its falling due, there might perhaps arise a legal presumption that the debtor had complied with his contract and paid, as per agreement. But when it is once established that there has been a breach of contract and the debtor has failed to pay at the right time, we are inclined to think there is a fair legal presumption arising that the debt continues due and unpaid until something is shown to the contrary, or there is such lapse of time as to raise a contrary presumption. Eleven days would not be sufficient for such presumption.

The affidavit, aided by this legal presumption, was sufficient to make a *prima facie* case for the issuance of an attachment.

Construed with reference to the legal presumption above referred to, it did show the existence of a debt due from defendant to plaintiff at the time of the issuance of the attachment. This was a literal compliance with the terms of the statute. It is true the evidence was not so satisfactory as it would have been if the affidavit had been made simultaneously with the issuance of the writ.

The remedy by attachment is a harsh one, and it may be claimed that a plaintiff should not be allowed to avail himself of it unless he makes an affidavit showing the facts upon which he bases his application for the writ with as much certainty and precision as such facts are capable of being shown by his own testimony—that defendant should be protected from the issuance of so harsh a writ upon loose and uncertain showings.

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When a Court is in doubt about the construction of a statute, it will undoubtedly look to the effect to be produced by one or the other of two constructions, and endeavor to construe the law so that its operation may be beneficial and not oppressive. If, however, we look to the beneficial effects to be produced by a construction of this statute, we think such construction as would sustain an attachment issued under an affidavit such as was filed in this case would be decidedly more beneficial than one requiring the affidavit to be made of the same date as the application for the writ. The plaintiff is only required to make a *prima facie* case for the issuance of a writ. His own affidavit without any additional proof is sufficient. In practice it may frequently happen, and doubtless does often happen, that a plaintiff swears that defendant is in debt to him, when in fact there is no such debt existing. But we apprehend it would seldom if ever occur, that a party having a just debt against another would make the necessary affidavit for an attachment, collect the debt after the affidavit was made, and then sue out the attachment after his debt had been paid. If such a case should ever arise the defendant would still have the undertaking, which any attaching creditor has to file, to resort to for indemnity.

In large counties, such as we have in this State, it would frequently be impossible for a creditor to make the affidavit for an attachment and send it from his residence to the county seat in one day, consequently a creditor living in some of the remote parts of the State would be compelled to travel several hundred miles in order to get an attachment, if we require the affidavit to be of the same date as the writ. We think it not necessary to make such rigid requirements of attaching creditors. If the attachment is improperly issued, the defendant may have it quashed on motion.

In some of our sister States attachment is, under certain circumstances, a means adopted for giving jurisdiction to the Court over the persons of litigants. The attachment of property is a substitute for the summons or personal notification of defendant to appear and answer. In such case the Courts have always required a rigid compliance with the law to confer jurisdiction on the Court. But when the attachment is issued, not to obtain jurisdiction, but merely to enable the Court to enforce its judgment, the Courts have been

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much more liberal in sustaining attachments. In New York, under the code, it has been frequently held that even when the affidavit for an attachment was insufficient, the plaintiff would be allowed to amend after motion made to dismiss for defect in original affidavit. It is true these rulings have not been uniform, but that is the general current of the New York authorities. (See case of *Freeman et al. v. David Walter*, 13 Howard Practice Reports, 348, and cases therein collated.)

In this case the affidavit was not, as we think, insufficient; and even if it was, according to the case cited it might have been amended. It appears to us that this rule allowing amendments to affidavits is a good one for this reason. The attachment may be issued not only at the commencement of a suit, but at any subsequent time before judgment. If the attachment is dismissed for informality in the affidavit, the plaintiff can immediately make a more formal affidavit and have the same goods again attached. The effect then of dismissing the attachment would be only to put the plaintiff to some costs, but not to afford any relief to defendant. Courts are always reluctant to do an act which makes costs for one party, but affords no relief to the other.

Drake on Attachment lays down the rule positively that an affidavit prior in date to the day of the issuance of the attachment is sufficient. (See Sec. 111, and authorities therein cited.)

He also thinks that a motion to quash an attachment because of a defective affidavit should not be sustained, unless the plaintiff, after opportunity afforded, fail to make one more perfect.

The judgment of the Court below is affirmed.

I concur in the judgment.

Dissenting opinion of LEWIS, J.

I fully concur in the opinion of the Chief Justice, delivered in this case, except that portion referring to the respondent's affidavit for attachment.

In my judgment, that affidavit meets neither the letter nor spirit of the statute. The provisional remedies of the Practice Act were unknown to the common law. They are summary and harsh in their character, and should therefore be strictly pursued by liti-

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gants resorting to them for aid. This statute under consideration— in certain cases—upon the mere *ex parte* affidavit of the plaintiff, allows the property of the defendant to be summarily seized and taken from his possession before he has an opportunity of being heard in Court, or contesting the legality of the claim made against him. Whilst it may be perfectly proper to allow the creditor this summary remedy against his debtor, it must be conceded that the debtor should be protected from its abuse by all the safeguards which can possibly be thrown around him.

This the Legislature has endeavored to do by requiring the party suing out the attachment to make an affidavit of the existence of certain facts, and to give a bond or undertaking for the protection of the person whose property is to be attached. The affidavit required of the plaintiff is to some extent security to the defendant against the issuance of the writ in cases in which it is not authorized. The statute specifies the cases in which it may issue. "First: in an action upon a contract for the direct payment of money, which contract was made or is payable in this State, and is not secured by mortgage, lien, or pledge upon real or personal property; or, if so secured, when such security has been rendered nugatory by the act of the defendant. Second: in an action upon a contract against a defendant not a resident of this State." In this very awkward language the Legislature has pointed out the only cases in which an attachment may issue against the goods of the defendant. And that it might not issue in any other case, by the section following the one quoted above the party applying to have it issued is required to make affidavit that the necessary facts do exist—to show by his own oath that it is one of those cases wherein an attachment is authorized. Whilst this affidavit is required, the defendant has some security against its issuance, except in a proper case; because if all the necessary facts be not sworn to the attachment should not be issued, and the fear of a prosecution for perjury will usually be sufficient to deter any false swearing as to the existence of those facts. Protection for the debtor is doubtless the sole object of requiring the affidavit from the plaintiff. It follows, then, that the defendant has a right to insist that the writ shall issue in no case except it be one of those specified in the law,

and that the affidavit shall at least substantially conform to the requirements of the Practice Act. If an affidavit be necessary at all, it is equally necessary that it substantially conform to the requirements of the law. If the Courts can hold that any material requirement of the Act authorizing the issuance of an attachment can be disregarded, why may they not disregard all its requirements? If an affidavit, which fails to show the existence of some material fact which is required to be shown by it, be held sufficient to support an attachment, it seems to me that by the same reasoning it might be sustained, though there be no affidavit whatever; for if one material requirement can be dispensed with, all may be.

The question then presents itself, whether the affidavit under consideration conforms to the requirements of the Practice Act. In my opinion it does not. Section 2, Laws of 1864-5, p. 223, declares that "the Clerk of the Court shall issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, which shall be filed, showing first, that the defendant is indebted to the plaintiff," etc. * * * * * "Third: that the sum for which the attachment is asked is an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff."

This language is certainly explicit that the affidavit must show that the defendant is indebted to the plaintiff, and that the sum for which the attachment is asked is an actual *bona fide* existing debt at the time the affidavit is filed. The affidavit must show that the defendant is indebted, and that the debt is due at the time the attachment is applied for, not that such facts existed eleven days before. If these facts do not exist at the time the writ is applied for, the plaintiff is not entitled to it. That they did exist eleven days before is not sufficient to authorize its issuance. Surely no argument is necessary to sustain this proposition. That the defendant is indebted at the time the attachment is applied for is therefore a material fact, and is indispensable to the right to have the attachment issued. Indeed it is not more necessary for the plaintiff to swear to the existence of a debt from the defendant, than it is for him to show by his affidavit that such debt exists *at the time* he applies for the writ; because if it did not exist *at that time* he is no more entitled to the attachment than if no debt had ever existed.

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Can it, then, be said that the letter or spirit of the law is met by the filing of an affidavit sworn to eleven days before the time of the application for the writ?

Is it shown by the oath of the plaintiff that the facts recited in his affidavit existed at the time he applied for the writ? Certainly not. Instead of the plaintiff's oath that the defendant is indebted to him at that time, there is nothing but a presumption of law to support it. It is quite evident that in the intermediate time between the date of the affidavit and the application for the attachment, all the grounds authorizing it may have ceased to exist. The debt may have been paid, a mortgage or pledge may have been given to secure it, or the defendant, though perhaps not a resident of the State at the time the affidavit was sworn to, may have become so before the application for the writ. Hence the necessity for showing that the proper facts exist *at the time* of the application for the attachment. If the law requires anything, it requires the person seeking the issuance of the writ to swear that the debt exists and is payable at the time he applied for the attachment. As in my opinion nothing of the kind was done in this case, the attachment was improperly issued, and should be dismissed.

But a presumption of law is invoked in aid of the affidavit in this case, and it is claimed that as the plaintiff made an affidavit showing the necessary facts eleven days before application for the writ, the law presumes a continuance of those facts until the contrary is shown. Of the correctness of this rule of evidence there can be no doubt, but it seems to me that it is impotent to assist the plaintiff in this case. There may be a presumption of law that the state of facts sworn to in the affidavit continued up to the time the attachment issued; but that does not meet the requirements of the Practice Act, which makes it incumbent upon the plaintiff to make an affidavit that they did exist at that time. It seems to me totally inadmissible to substitute a presumption of law for an affidavit which is explicitly required by the statute. Such presumption as evidence is greatly inferior to that required by the statute, and much less satisfactory than the affidavit of the plaintiff would be. I do not think the attachment should be allowed to issue upon evidence inferior in its nature to that required by the law. If the Courts

can disregard the plain letter of the statute as to the character of evidence required to prove the existence of the facts authorizing an attachment, why may they not disregard its requirements entirely, and allow the writ to issue without evidence at all? It cannot be claimed that those requirements are merely directory. Where then is the authority for departing from their strict letter? True, the construction which I place upon the law may in some cases produce hardship and inconvenience, but consequences should never influence a Court in its construction of a law which is not ambiguous in its phraseology. If the Legislature has expressed its intention clearly, that intention must be followed regardless of consequences. That it is clearly expressed, it seems to me there can be no doubt.

I am aware that there are cases in New York which hold that a defective affidavit may be bolstered up by supplemental affidavits, and that in that way attachments have been maintained which could not be supported upon the original affidavit. The plaintiff in this case, however, is not holpen by these authorities, for the reason that he made no effort or offer to cure the defect complained of. I am also aware that it has been held in South Carolina and in Missouri that an affidavit made as this was, several days before the application for the writ, is sufficient. I do not know, however, what the statutes may be upon which these decisions are made, and as they seem to be in direct conflict with the clear spirit and letter of our statute, I am not inclined to follow them.

These being my views on this point, I am constrained to dissent from that portion of the Chief Justice's opinion which refers to it.

Birdsall v. Carrick.

FREDERICK BIRDSALL, APPELLANT, v. B. H. CARRICK,
RESPONDENT.

Without the express approval of the Governor, an Act of the Legislature can only become a law in two cases. First: when it is passed over his objections by a two-thirds vote of each House. Second: when he fails to return a bill with his objections within the time prescribed by the Constitution.

When the Governor in due time sends back a bill which has been submitted to him, stating that he cannot act on it because of some supposed informality in its passage, this is in effect an objection to the bill, and it can only become a law by further action of the Legislative branch, although the Governor may have been mistaken as to the supposed defect in the bill.

IN this case, there was a petition to this Court for a mandamus to compel the Treasurer of Lyon County to pay certain warrants out of the General Fund of that county. The Treasurer admitted there were funds in the Treasury applicable to these warrants, unless the same had been diverted by what was claimed to have been a law passed at the session of the Legislature begun on the first Monday of January, 1867. The petitioner contended that the pretended law was never regularly passed, and if so passed was unconstitutional. There were a number of objections raised to the validity of the law, and a large number of sections of the Constitution discussed by the respective counsel. But, as only one point was passed on by the Court, it is not deemed necessary to go into a statement of facts not connected with the point on which the decision was made. The only point decided by the Court was as to the effect of the Governor's Message accompanying the bill when it was sent back to the Secretary of State.

The facts in relation to that point, are fully stated in the opinion.

Waldo & Wells, for Petitioner.

Wm. M. Gates, for Respondent.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

The petitioner's application is for a writ of mandamus to compel the Treasurer of Lyon County to pay a certain warrant or evidence of indebtedness issued by the county and made payable out of its

General Fund. The Treasurer refuses to pay the warrant because it is claimed that this, with all other claims against the General Fund of that county, is to be funded in accordance with the provisions of an Act of the Legislature of the present year, entitled "An Act authorizing the County of Lyon to Fund the Outstanding Indebtedness against the General Fund of said County; to pay the Interest thereon, and for the Gradual Liquidation of the same."

The first section of this Act discloses that :

"For the purpose of placing the finances of Lyon County on a permanent cash basis, and to enable the county to pay its indebtedness, the Board of County Commissioners, Treasurer and Auditor of said county are hereby appointed a Board, and authorized to fund all outstanding indebtedness against the General Fund of said county of Lyon, which accrued on or before the first Monday in May, A.D. 1867, by issuing bonds in payment thereof, payable at the office of the County Treasurer, in the following manner, to wit: one-fourth of the whole amount on the first day of January, A.D. 1869; one-fourth of the whole amount on the first day of January, A.D. 1870; one-fourth of the whole amount on the first day of January, A.D. 1871, and one-fourth of the whole amount on the first day of January, A.D. 1872. Said bonds shall bear interest at the rate of ten per cent. per annum from the first day of July, A.D. 1867, and said interest shall be payable semi-annually, on the first day of January and July of each year."

It is conceded that except for the provisions of this Act, the warrant held by the petitioner could be paid, there being a sufficient amount of money in the General Fund for that purpose. This Act is the only showing made by the Treasurer why a peremptory writ should not issue compelling him to pay the warrant. In reply to that showing, the petitioner claims that the Act in question never became a law; that there is no lawful authority for funding the indebtedness of the county, and refusing to pay his warrant whilst there is sufficient money in the proper fund wherewith to do it. Our inquiries are thus confined to the question whether the Funding Act referred to, and which Carrick claims is a sufficient showing why the writ should not issue against him, is now or ever was a valid law. We fully agree with counsel for Birdsall that it

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never possessed the virtue or authority of law. Without the express approval of the Executive, there are but two ways by which an Act of the Legislature can become a law: 1st. By receiving a two-thirds vote of both houses of the Legislature after it has been vetoed and returned by the Governor. 2d. By a failure on the part of the Governor to return it to the house where it originated within five days after its reception by him whilst the Legislature is in session, or within ten days after the adjournment of that body. In both of these cases, the Act becomes a law without the signature or approval of the Executive. (Vide Constitution, Art. 4, Sec. 35.) These are the only cases, however, in which the approval of the Governor can be dispensed with. In all other cases, such approval is as essential to give it the sovereign authority of law as the passage by the Legislature itself.

In this case, the Legislature adjourned before the expiration of five days after the bill was presented to the Governor, and the time within which he was required to act upon it was thereby extended ten days further. Before the expiration of that time, it was returned to the office of the Secretary of State, as required by the Constitution, (Sec. 35, Art. 4) with a message giving reasons why it was not approved. It appears from that message, that some days after the adjournment of the Legislature it was discovered that the Secretary of the Senate had neglected to sign the enrolled bill, an omission which, in the opinion of the Governor, was so fatal that his approval would not cure it, or give the Act the authority of law. After mentioning that fact, he concludes his communication in the following words: "Believing this omission would be fatal to the bill, even if approved, I cannot act upon it."

Here is clearly a reason given for not approving the bill—a succinctly stated objection to it which appeared to the Governor so material that his approval would do no good: hence he refused to do what seemed but an idle and useless act.

It is not within the province of this Court to determine whether the objections interposed by the Executive possessed any substantial merit or not. The Legislature is the only tribunal which has the authority to pass upon that question. It is only for this Court to determine whether the bill in question became a law or not—that is

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in this case whether it was approved or not ; and if not, whether it became a law by a failure to return it within the time prescribed by the Constitution. It is admitted that it was returned to the office of the Secretary of State before the expiration of the lawful time. That it never passed the Legislature by a two-thirds vote after it was so returned, is also conceded. And that objections are urged to it and a reason given for not approving it, cannot, it seems to us, be very seriously questioned. It is perfectly clear that the Governor did not intend to give the bill his approval, or he would have signified it by his signature. That he did not intend it to become a law by lapse of time is evident from the fact that he returned it within the period prescribed by law.

Had the legislative body been in session when the omission of the Secretary's signature was discovered, it could have been supplied upon the suggestion of the Governor ; and after the adjournment of that body, it was probably no reason why it should not have been approved ; but as it was not, the refusal to do so must be followed out to all its legitimate consequences.

We are, therefore, satisfied that the Act never became a law, and that it constitutes no authority to the Treasurer to refuse the payment of the warrant.

Hence a peremptory writ of mandamus must issue, in accordance with the petition.

WM. B. FLEESON, APPELLANT, v. THE SAVAGE SILVER MINING CO., RESPONDENT.

Under the Act of this Territory passed in 1862 for the Formation of Corporations, &c., stockholders were made personally liable for their portion of all debts contracted whilst they were members of the corporation. Consequently, one who was a stockholder when a suit was commenced against a corporation would be liable for his share of any costs incurred whilst he remained a stockholder, and would be disqualified as a juror.

Causes should not be reversed for trivial errors which could not be reasonably supposed to lead to any injurious result.

If a disqualified juror is forced on a trial jury against the protest of one of the parties, we may reasonably infer injury resulted from such an error.

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If a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured. An injury could only arise in case he was compelled to exhaust all his peremptory challenges, and afterwards have an objectionable juror placed on the panel for want of another challenge.

When a party in assigning errors, or stating the grounds on which he will move for a new trial, says that the Court erred in doing a certain thing, this is no evidence that the Court did as charged. To establish that fact, it must appear in the statement of facts. The assignment of errors, and the statement of the facts or evidence to sustain these alleged errors, are separate and distinct things. The party moving for a new trial may state the errors complained of in his own language. Neither the Court nor the opposite party can correct that. The Court can only correct the statement of facts or evidence.

When only one peremptory challenge is shown to have been used, the Court will presume the other three were not used.

ON REHEARING.—The mere expression of an erroneous opinion during the progress of a trial by the Judge of a *nisi prius* Court, will not be cause for reversing a judgment. It must be shown that some result injurious to the appellant followed that opinion.

Where an erroneous ruling of a Court on the trial of a cause might reasonably be followed by one or the other of two results—the one perfectly harmless, and the other injurious to the appellant—the record must show which result did follow, or this Court cannot reverse the judgment.

Where a juror is challenged for cause, that challenge is erroneously overruled, and the challenging party afterwards moves for a new trial on the ground that he was forced to exhaust his *peremptory challenges* on this juror, this assignment of error negatives the idea of the juror having served on the panel.

APPEAL from the District Court of the First Judicial District, Hon. C. BURBANK, presiding.

On the trial of this cause, John Gillig was called as a juror. It appeared by his examination, touching his qualifications for a juror, that after this suit was commenced against the defendant he became a stockholder in that corporation, and so continued to be for some time, during which the suit was pending, but had sold out all his stock in the company previous to being called as a juror. It also appeared that, during the pendency of this suit, he had made a contract with a stockholder of the company to purchase from him ten feet or ten shares of stock in the company.

Before this stock was actually transferred to him, he assigned the contract to another party, and at the time of his examination touching his qualification as a juror, he neither held any stock in the company nor had any contract for the purchase of stock therein.

J. Neely Johnson and Robert M. Clarke, for Appellant.

John Gillig was interested in the result: he had purchased ten feet of ground, to be paid for in the future. He was in any event bound to the party from whom he purchased. If the company lost this suit, his assignee would be less able or less willing to meet Gillig's liability to the original vendor. Consequently, Gillig's liability would thereby be increased.

The amount of interest is unimportant. The smallest amount disqualifies. *Executors of Lynch v. Horry*, 1 Bay, 229.

An Appellate Court will not reverse a case for errors trivial and not injurious to the party complaining. But it must appear affirmatively that they are not injurious.

Admitting it to be law (which we only do for the argument) that where a party is compelled by an erroneous ruling to exhaust one of his peremptory challenges, that it is no injury to him if he has other peremptory challenges not exhausted, still this principle does not apply here. It does not appear here that appellants had other challenges; but on the contrary, it appears that the challenge of Gillig exhausted his right to challenge.

When a party is compelled by an improper ruling to challenge a juror peremptorily, this is error. (*Baxter v. People*, 3 Gilman, 368; *McGowan v. The State*, 9 Yager, 184.) The same rule exists even if it appear affirmatively that the party complaining still had peremptory challenges not exhausted. (*Lithgow v. Commonwealth*, 2 Vir. Cases, 297.)

C. J. Hillyer, for Respondent.

Gillig had no interest in the event of this suit. He had sold his stock, if indeed he ever had any. He had also assigned his contract for the purchase of stock. His vendee was equally responsible to him, however this suit might go.

Admitting the Court erred in its rulings as to the juror, the error was harmless.

I. A bill of exceptions, or statement, must not merely show that an erroneous ruling was made, but must also state such facts as make it apparent that the party excepting has sustained, or may have sustained, material injury thereby.

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This record fails to show whether or not Gillig served as a juror. In the absence of such showing, no affirmative error is shown. It is only in criminal, perhaps only in capital cases, where the Courts have reversed cases on an erroneous ruling with regard to the qualifications of a jury, where it was not affirmatively shown that the juror sat on the trial of the case.

In criminal cases there is a great conflict of opinions. The rulings in Virginia are most favorable to appellant's views. In that State it is held, if the Court erroneously overrules a prisoner's objections to a juror, the error is not cured by a subsequent peremptory challenge, even if the prisoner does not exhaust his peremptory challenges. (*Lithgow v. Commonwealth*, cited by plaintiff, and *Dandy v. Commonwealth*, 9 Grattan, 727.)

In Illinois, there is a dictum to the same effect, the case having gone off on another point. (See case cited by appellant.)

In Tennessee, it is held that the prisoner must have exhausted all his peremptory challenges—and this too must appear affirmatively from the record—before he can be heard to complain of having been forced by an erroneous ruling to challenge a juror peremptorily. (*McGowan v. State*, cited by appellant, and *Carroll v. State*, 3 Humphrey, 315.)

In California, the same rule is adopted. (*People v. Gatewood*, 20 Cal. 146.)

In New York, the peremptory challenge waives the error as to the ruling on the challenge for cause, whether the peremptory challenges are or are not exhausted. (*Freeman v. The People*, 4 Denio, 31.)

In Arkansas and Mississippi, the same rule prevails as in New York. (*Stewart v. The State*, 8 English; 13 Ark. 720; *Farri-day v. Selser*, 4 How. Miss. 506.)

Where there is nothing to show that an improper juror sat in the case, Courts are reluctant to reverse causes for mere trivial and unimportant errors committed in empanneling jurors. (*Carpenter v. Dunn*, 10 Indiana, 130; *People v. Ransom*, 7 Wend. 417; *United States v. Merchant*, 12 Wheat. 482.)

Opinion by LEWIS, J., BEATTY, C. J., concurring.

But one error is relied on by the appellant in this case as a

ground for the reversal of the judgment: namely, that the Court erred in overruling the challenge interposed to the juror John Gillig.

That jurors to be competent should stand indifferent, and should occupy no position nor stand in any relation which in contemplation of law renders them incapable of being impartial, there can be no question. They must be superior to every just objection, or in the language of Lord Coke, they should "be indifferent as they stand unsworn." When entering the jury box they should be free from all feelings of interest in the result of the action, from all prejudice against or favor towards either of the parties, with no opinion or conviction which would constitute the slightest obstacle to a fair consideration of the evidence, or a candid conclusion upon it.

We are satisfied beyond all doubt that the juror Gillig had an interest adverse to the plaintiff in this action, and was not, therefore, a competent juror.

The disqualifying interest, however, did not, as claimed by counsel for appellant, result from the contract to purchase a certain amount of the defendant's stock, and which had been assigned by him at the time of the trial, but from the fact that he was a stockholder in the Savage Company at the time this suit was commenced and for some time afterwards, and thereby under the laws then existing became liable for his proportion of the costs incurred during such time. By Section 16 of an Act entitled "An Act to provide for the Formation of Corporations for certain purposes," approved December 20th, A.D. 1862, it is declared that each stockholder should be individually and personally liable for his proportion of all the debts and liabilities of the company, contracted or incurred during the time that he was a stockholder. This law, except the twenty-sixth section, which was annulled and made void by Congress, remained in force until it was repealed by the Legislature of the State on the tenth day of March, A.D. 1865. This action having been instituted whilst that law was in force, and whilst the juror was the owner of a certain amount of stock in the company, his liability for a proportion of the costs incurred in it became established. His interest in the result is therefore clear, beyond all question: for if the plaintiff succeeded in obtaining judgment against

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the defendant, he, the juror, would thereby become liable to pay a proportion of the costs incurred during the time he was a member of the company; whilst, on the other hand, if the plaintiff failed, no such liability would exist. Hence, he was evidently disqualified under the fifth subdivision of Section 162 of the Civil Practice Act; and had he tried the cause we would have no hesitation in reversing the judgment for that reason. It is, however, admitted by counsel that he did not, but was peremptorily challenged by the appellant after the Court refused to allow his challenge for cause; and there is nothing in the record to show, nor indeed does it seem to be claimed in argument, that there was any objection to either of the twelve jurors who found the verdict. Such being the case, it is left to be determined whether the error committed by the Court below, in overruling the plaintiff's challenge for cause, was blotted out or cured by the subsequent peremptory challenge, or whether its effect was to prejudice or injure him, notwithstanding the juror did not try the cause. Upon this point we conclude that the peremptory challenge deprived the error, committed in overruling that challenge for cause, of all its force or effect as a ground for reversal of the judgment of the Court below.

Judgments otherwise regular and proper should not be set aside or disturbed for trivial or immaterial errors committed upon the trial. To justify a reversal by an appellate Court, the error should be of such character that its natural and probable effect would be to change or modify the final result. If it is clear, from the record, that no injury resulted from the error, the judgment should not be reversed, for the appellate Court does not set aside the judgment of an inferior tribunal because of the mere error, but for the injury resulting from such error. True, it is not always necessary for the party complaining to show directly that he suffered injury, because injury is usually presumed to be the result of material error. It is, nevertheless, the injury directly shown, or presumed, which is in fact the inducement to the reversal of the judgment. Hence, the rule observed by all appellate Courts, that only such errors as probably affected the verdict, or substantial rights of the parties, will warrant the granting of a new trial.

The ultimate object of all civil actions is to secure some legal or

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equitable right. The rules governing the impanneling of juries, the introduction of evidence and the general conduct of trials, are but the means by which such right is to be obtained. Unquestionably, those rules should be closely followed; but if it appear that a departure from them did not defeat or affect the ultimate object of the trial, it would be a mockery of justice to set aside a judgment otherwise proper and regular because of such departure. If the error complained of here was of a character likely to have affected the final result, the judgment should be reversed; otherwise it should be affirmed. If Gillig had acted as a juror, the injury to the appellant would be immediate, as it would deprive him of an impartial trial and force upon him an incompetent juror by refusing to sustain the challenge interposed by him. The presumption of injury in such case would be conclusive, because the juror, being rendered incompetent by law to sit in the case on account of interest in the result, the conclusion would be that he was influenced by such interest in finding the verdict. In that way the error of the Court in overruling the challenge would reach and affect the final result; but as the juror was peremptorily challenged and did not try the cause, how was the appellant injured by the error complained of? Counsel say, by being compelled to use one of his peremptory challenges to set aside a juror who should have been set aside for cause. That, however, could not possibly result injuriously to the appellant unless he had exhausted all his peremptory challenges, and there was some objectionable person on the jury who could not be set aside for cause. If it were shown to this Court that the appellant was improperly deprived of a peremptory challenge under such circumstances, where he may possibly have needed it, perhaps it might be treated as sufficient to authorize a reversal of the judgment. The law gives to each party in a civil action four peremptory challenges. If but one be used, though that be upon a juror who should have been set aside for cause, how can it result in prejudice? The party in such case would have three challenges left, which he could use if any of the jurors were objectionable to him. The fact of his not choosing to use them creates a strong presumption that he was fully satisfied with the jury—that it was unobjectionable to him. To obtain an

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impartial jury is the sole object of the law giving the right of challenge. Therefore, when such a jury is obtained, there can be no just grounds of complaint. By his own act in not setting aside any of the jurors when he had the power to do so, it is rendered clear that he had a jury satisfactory to himself. It is claimed by appellant that the record shows that his peremptory challenges were all exhausted. (But we find nothing of the kind in the transcript presented to us. The only reference to or mention of such a fact is found in appellant's assignment of errors. He says "the Court erred in refusing plaintiff's challenge to the juror John Gillig for cause, and compelling him to exclude said juror by peremptory challenge, thereby forcing him to exhaust his peremptory challenges, and thus disabling him from excluding other jurors to whom he objected.")

It is a proposition too clear for argument, that an assignment of errors cannot be received by an appellate Court as a statement of facts in favor of the party making such assignment. The party wishing to move for a new trial, or to take an appeal, may assign his errors in any form he pleases, and assume any position he may wish, but to make them available they must be sustained by a statement of the facts in the case.)

The Court in settling, or counsel in agreeing upon a statement, does not pretend to pass upon the correctness of the assignment of errors, nor indeed has either of them a right to interfere with them. The assertion in the assignment referred to cannot therefore be received or treated as a fact in the case. The admission of counsel that the juror Gillig was set aside, is the only evidence which we have that the appellant used any of his peremptory challenges. As the law gives four peremptory challenges, and only one is shown to have been used by appellant, we must presume that he had three remaining which he did not use. It cannot certainly be presumed that they were all exhausted when the record shows but one of them used. Hence we must treat the case as if the record showed affirmatively that but one peremptory challenge was used by the appellant.

But as we have endeavored to show, the employment of one such challenge, though to set aside a juror who should have been rejected

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for cause, will not justify the reversal of the judgment below. The view which we take of this question is fully sustained by the cases of *Freeman v. The People*, 4 Denio, 9, and *Farriday v. Selser*, 4 Howard Miss. Rep. 518). In the first of these cases the Supreme Court say: "Upon this point the prisoner had the power and right to use his peremptory challenges as he pleased, and the Court cannot judicially know for what cause or with what design he resorted to them. He was free to use or not to use them as he thought proper, but having resorted to them they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause would have been regularly here for revision. But he chose by his own voluntary act to exclude those jurors, and thus voluntarily, and as I think effectually, blotted out all such errors, if any, as had previously occurred in regard to them."

In the last case, the same question is disposed of in the following manner:

"It appears from the record, however, that when the juror was decided to be competent, Farriday set him aside by peremptory challenge. He did not therefore try the cause, and there is no exception to any of the twelve jurors who found the verdict. We are therefore inclined to the opinion that as the error complained of is not shown to have prejudiced the right of Farriday in any way, that it is not a good reason for reversing the judgment. It is a general rule that an appellate Court will not set aside a judgment otherwise regular and proper on account of a mistaken opinion of the inferior Court, which is not shown to have influenced the final result." So it seems to be held in Tennessee. (*McGowen v. The State*, 9 Yerger, 184.)

It was not shown by the record in any of these cases whether the appellant had exhausted his peremptory challenges or not. They therefore clearly sustain the proposition that no injury will be presumed from the error complained of here, unless indeed it be shown by the appellant that his peremptory challenges were all exhausted. In such case, there being a possibility of injury, the judgment might be reversed.

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But in this case, as we have shown, the presumption from the record is that the appellant used but one of the challenges, and that he had three remaining unused.

There could therefore be no prejudicial results from the error complained of, and the judgment must be affirmed.

JOHNSON, J., having been counsel in this case, does not participate in the decision.

RESPONSE TO PETITION FOR REHEARING.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

The first proposition of counsel upon petition for rehearing is that this Court erred in holding that nothing contained in the assignment of errors could be treated as a statement of fact, admitted to be correct by the other side. Upon a careful reëxamination of the case, we still think we were right. On page ten of the record we first find the title of the Court in which the action was pending; then the title of the case, and then follows this language:

"Plaintiff's statement and bill of exceptions to be used in said Court on a motion for a new trial of said cause, and in the Supreme Court should said motion be denied.

"Plaintiff moved for a new trial on the following grounds, to wit:

"1. Insufficiency of the evidence to justify the verdict; and to sustain this, he refers to the statement of the evidence hereto annexed, marked Exhibit A.

"2. Errors in law occurring at the trial and excepted to at the time by the plaintiff, to wit:

"I. The Court erred in refusing plaintiff's challenge to the juror John Gillig for cause, and compelling plaintiff to exclude said juror by peremptory challenge, and thus disabling him from excluding other jurors to whom he objected. And to sustain this he refers to Exhibit A, pp. 2½, 2½, 2½, and 3."

A number of other alleged errors of law are stated, and finally, on page eleven of the record, this paper seems to end in this way:

"For the purposes of this motion plaintiff will refer to the docu-

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mentary evidence on file, and not included in Exhibit A, as well as the minutes of the Court.

“ J. S. PITZER, and
“ REARDON & HEREFORD,
“ Plaintiff’s Attorneys.”

On page twelve we have again the entitling of the Court, the cause, the names of attorneys, etc., followed by this language :

“ In the impanneling of the jury, M. M. Mitchell sworn to answer questions.” Then follow the questions to and answers of Mitchell. Then the questions and answers of other jurors, the rulings of the Court, the testimony of the witnesses in the cause, etc. Finally the statement winds up as follows :

“ Case closed and submitted to the jury, who retired, and returned into Court, and delivered a verdict in favor of defendant. The jury being then polled at the request of plaintiff’s attorneys, eleven of the jurors concurred in the verdict ; one only disagreed to it.

“ The foregoing statement is agreed to as correct.

“ November 27th, 1865.

“ PITZER & KEYSER, and
“ REARDON & HEREFORD,
“ Attorneys for Plaintiff.
“ CRITTENDEN & SUNDERLAND,
“ Attorneys for Defendant.”

The question is : When counsel for defendant agreed to the foregoing statement, what did they admit ? With regard to the testimony, the answers of jurors to questions touching their competency, and the rulings of the Court, it was no doubt intended to admit that these were correctly stated in the foregoing statement. It was also undoubtedly intended to admit that counsel for plaintiff had filed a paper such as appears on pages ten and eleven of the transcript. But surely it cannot be contended that defendant’s counsel intended to admit, or did admit, that all the propositions contained in that assignment were true. The defeated party in any cause may file an assignment of error, containing anything he may choose to insert therein. He may assign a hundred errors having no foundation in fact and no connection with the case. The opposing counsel, in

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settling the statement, could not deny the filing of such an assignment of errors. As we understand the admission of defendant's counsel, it is simply that plaintiff had filed an assignment of errors such as is set forth on pages ten and eleven of this transcript.

That plaintiff's counsel did not consider this assignment of errors as stating the *facts* of the case, is shown on the face of that assignment. The first error of law assigned reads thus :

"1. The Court erred in refusing plaintiff's challenge to the juror John Gillig for cause, and compelling plaintiff to exclude said juror by peremptory challenge, thereby forcing the plaintiff to exhaust his peremptory challenges, and thus disabling him from excluding other jurors to whom he objected. And to sustain this, he refers to Exhibit A, pages 2 $\frac{1}{2}$, 2 $\frac{3}{4}$, 2 $\frac{3}{4}$, and 3." If the assignment of errors was also to stand as a statement of the facts to support the error, why refer to certain pages in Exhibit A to sustain the assignment? Undoubtedly the counsel understood the assignment as the Court does: merely as a statement of the point of argument to be used, with reference to another paper, for the facts to sustain the point. If not, why refer to Exhibit A to sustain the exception?

In the transcript we find nothing which is called Exhibit A; but we suppose reference is made to the statement beginning on page twelve. That statement simply shows that John Gillig was questioned touching his qualifications as a juror; that, after the examination, plaintiff interposed a challenge for cause, which challenge was overruled by the Court. Here the statement closes, without showing what after-action was taken. After a challenge for cause is overruled, one of two things usually happens: the challenging party interposes a peremptory challenge, or else the juror is sworn, and sits in the case. A statement, or motion for new trial, or an appeal, should certainly show which of these events actually happens.

Causes are reversed, not because Judges at *nisi prius* entertain wrong opinions upon some point of law arising in the progress of the trial, but because they give some practical effect to such erroneous opinions. A bill of exceptions or statement should not stop with merely showing that the Judge expressed an opinion which was erroneous: it should show that some wrong step was

taken in the progress of the trial. If a Judge expresses an erroneous opinion about some material point in his charge to the jury, that opinion is error, because the jury are supposed to be influenced by the erroneous views of the Court. But if a Court rules that a certain kind of testimony is admissible, when in fact it is not admissible, this ruling, unless it be taken advantage of by the opposite side, does no harm and is not such error as will reverse a judgment. Hence, in such case, a bill of exceptions should not merely state what was the ruling of the Court, but should also state distinctly that the illegal testimony was introduced under the ruling. So, if a juror is challenged for cause and the challenge is not allowed, the statement or bill of exceptions should show distinctly what disposition was made of the juror. If that is not shown, we do not see how this Court is to determine that error was committed. The mere opinion of the Judge does no hurt to either side. It is his action founded on that opinion which is erroneous. If this Court is not apprized of what that action was, how can it review the case? In this case, the statement only shows what was the opinion of the Court: it does not show what resulted from that opinion—what subsequent action was taken.

If the opinion could only have produced one result, then indeed the statement need only have shown what the Judge decided, because this Court would have understood what necessarily followed. But if an opinion of a certain character may have been followed by several courses of action, some of which would have resulted in injury to the party excepting and others been perfectly harmless, we cannot say whether any injury was done to the complaining party. The affirmative is on the appellant; and failing to show error, the judgment of the Court below must be affirmed.

In our former opinion, we say it is admitted by counsel that Gilling did not sit in the case; and petitioner claims that this *admission* should not bind appellant, because it was made simply on the facts presented by the statement, as understood by appellant's counsel; that if the assignment of error is not to be considered as containing facts on which the Court can act, neither should the counsel for appellant be bound by the facts therein stated which militate against his client.

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This position is perfectly correct. But leaving this admission out of the case, appellant is in no better condition.

In the first place, there is no assignment of error on the ground that Gillig did serve as a juror; and if the appellant were allowed to file such an assignment in this Court for the first time, then the record would show two assignments directly contradictory, the one of the other. First, that appellant was compelled to exhaust one of his peremptory challenges to get Gillig off the jury. Second, that he (Gillig) served on the jury. No possible state of facts could support both these points. Yet both points might have been made in the assignment of errors in the Court below, and no Judge, in settling the statement, could with propriety have stricken either out. The assignment of errors is in the discretion of the appellant. This Court must judge whether the facts stated in the record sustain the assignments. In this case, there being no assignment of error on the ground that Gillig served as a juror, but only that appellant was compelled to challenge him peremptorily, we did assume that the record showed a peremptory challenge. We did this upon the ground that if he had served as a juror, it would have been a much stronger point for appellant. When, therefore, the appellant only complained of being compelled to challenge, we assumed that the juror had not served in the case. If he had served, it is not likely the appellant would have failed to complain of it.

Only two results could reasonably have followed the ruling of the Court on the challenge for cause: the one, that Gillig served as a juror; the other, that he was peremptorily challenged by appellant. If he served, it was clearly error. If the compelling appellant to challenge peremptorily was error, then certainly the case should be reversed, because error injurious to appellant was the necessary result of the ruling, and it would be unnecessary to determine whether this injury resulted from the juror serving or from the challenge.

But as, in our opinion, one of these results would have been error and the other not, it becomes necessary for us to determine, if we can, which result did follow the ruling; or if we cannot determine that, then to settle what the rule should be in a case thus

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left uncertain. As we before said, the appellant must make out his case, and if he only established the fact that something was done which might or might not have produced a result injurious to himself, he has failed.

So, too, all reasonable presumptions are to be indulged in favor of the regularity of proceedings in the Court below. This last rule has not much force in this case, because it is conceded the Judge below did err in his rulings; but still, as the chances were even as to whether that error of judgment was followed by action injurious to appellant, or that which was perfectly harmless, even in such case the rule is perhaps not altogether inapplicable.

As there was an assignment of error on the ground that appellant was compelled to exhaust his peremptory challenges on Gillig, and none on the ground that Gillig served as a juror, certainly the presumption is that he was challenged. Whether this exhausted his peremptory challenges, or whether he still had one, two or three at his disposal, did not appear of record. The question then arose, whether this was sufficient to reverse the case. This question was one of very great doubt with the writer of this opinion. Upon an examination of authorities, we find a most decided preponderance in favor of the views we took in the case. The Virginia cases seem to hold that the simple fact of compelling a party to challenge a juror peremptorily when he should have been set aside for cause, would be good ground for granting a new trial.

These decisions were in criminal cases. Possibly, the rule might be different in that State in civil cases. There is also a dictum in 3 Gilman's Reports, 368, to the same effect. This was also in a criminal case. On the other side, we find the several cases referred to in the original opinion. As the record fails to affirmatively show that appellant did exhaust his challenges, we think the original opinion must stand as the law of the case. In this case, probably the appellant, on a more full and complete statement, would have been entitled to a new trial.

We always regret being compelled to decide a case on a mere technicality not affecting the merits, but we cannot go outside of the record.

A rehearing is denied.

State of Nevada v. Hall.

STATE OF NEVADA, APPELLANT, v. ARATUS H. HALL,
RESPONDENT.

A verdict of acquittal on a good indictment puts an end to all further prosecution for the offense charged in that indictment, notwithstanding any errors that may have been committed during the progress of the trial.

APPEAL from the District Court of the Second Judicial District,
Hon. S. H. WRIGHT, presiding.

In this case the Court below ruled out certain testimony, without which the prosecution could not succeed. The District Attorney excepted to the ruling, and after the prisoner was found not guilty and discharged, appealed to this Court, resting his case on the ground that the Court below erred in excluding the testimony.

R. M. Clarke, Attorney General, for Appellant.

Geo. A. Nourse & A. C. Ellis, for Respondent.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

At the last December Term of the District Court for the County of Ormsby, the defendant was tried upon an indictment charging him with the crime of grand larceny, and acquitted by the jury. From this verdict, and the judgment rendered thereon discharging the prisoner, the State takes an appeal to this Court.

As the indictment is clearly sufficient, and admitted to be so by the Attorney General, it cannot be seriously claimed that any Court has the power to set aside a verdict or reverse a judgment of acquittal, and order the defendant to be retried. A verdict of acquittal upon a good indictment legally puts an end to all further prosecution for the same offense. No error, therefore, however great, will justify a Court in setting it aside.

Appeal dismissed.

JOHNSON, J., was counsel in the Court below, and did not sit in this case.

STATE OF NEVADA, APPELLANT, v. DANIEL E. EASTABROOK, RESPONDENT.

Where property is in this State at the time a levy is made thereon for taxes, the owner thereof becomes liable for the tax, although he may have removed the property before the value thereof is assessed.

The Constitutional provision, which requires "a uniform and equal rate of assessment and taxation," requires that all *ad valorem* taxes shall be at a uniform rate or per centage. One species of property cannot be taxed at a higher rate than another.

The products of mines being subjected by Constitutional provision to taxation, in lieu of the body of the mine, the entire annual product must be subject to taxation at the same rate or per centage as other property.

The first section of the Revenue Law levies a State tax of one dollar and twenty-five cents, and authorizes a County tax not exceeding one dollar and fifty cents on each hundred dollars' worth of all taxable property in the State. This is clearly in accordance with the Constitution.

Section 99 imposes on the products of the mines an annual *ad valorem* tax of one per cent. for State and County purposes—say one-half per cent. for each. Whether this be held as a substitute for the tax levied in the first section, or as an addition thereto, it is equally void and unconstitutional. Products of the mines can neither be taxed more nor less than other taxable property.

The Legislature may direct the manner of assessing property, so as to obtain a fair valuation. This Court could only declare such a law unconstitutional where it was manifestly intended to evade the provisions of the Constitution rather than to effect a fair valuation.

That portion of Section 99 declaring that three-fourths of the value shall be subject to taxation, is manifestly unconstitutional. The value once being ascertained, the whole is liable to taxation.

Section 117, being merely to carry out the unconstitutional part of Section 99, falls with it, and is void.

If a law be passed by the Legislature, constitutional in part but unconstitutional as to some of its provisions, that which is constitutional will be sustained, unless the whole scope and object of the law is defeated by rejecting the objectionable features.

In this case, rejecting that part of the Act which is unconstitutional, there still remains a complete Revenue Law.

If Section 99 was the only section providing for the taxation of the products of the mines, the whole law would fall with that section; but as Section 1 provides for the taxation of all taxable property, (of course, including products of mines) the law is complete, leaving out Section 99.

The Tax Collector and other revenue officers should have disregarded the unconstitutional portions of this Act, and proceeded to collect the tax equally from all property under those provisions which are constitutional. Any tax-payer, by a proper proceeding in Court, could have compelled such a proceeding.

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One tax-payer cannot be allowed to escape payment of his taxes because the Collector has improperly failed to collect from another from whom taxes are due.

APPEAL from the District Court of the Second Judicial District, Hon. S. H. WRIGHT, presiding.

R. M. Clarke, Attorney General, and *S. C. Denson*, District Attorney for Ormsby County, for Appellants.

Section 1, Article X, of the Constitution, does not require the proceeds of mines to be taxed at the same *ad valorem* rate as other property. It requires other taxable property to be taxed at "a uniform and equal rate of assessment." The proceeds of mines are only required to *be taxed*. The language of some portions of that section does not apply to the proceeds of mines.

If "proceeds of mines" is included in the terms "all property, real, personal and possessory," this law is not unconstitutional, for Section 1 levies a tax on all such property, except that which is exempted by the provisions of the Constitution.

Section 5 of the Act defines certain terms, and says proceeds of mines shall not be considered as coming within the definition of personal property, but does not attempt to exempt such proceeds from taxation. When a statute assumes to state the effect of a certain provision, we must presume that *all* the effects intended are stated. (See *Bird v. Dennison*, 7 Cal. 307; *Lee v. Evans*, 8 Cal. 435; *People v. Whitman*, 10 Cal. 45; *Perkins v. Thornburgh*, 10 Cal. 191.)

A saving clause in a statute must be rejected when in conflict with the body of the Act. (See *Kent's Com.* 462-3, and note; *Savings Institution v. Makin*, 23 Maine, 360; 15 Peters, 445.)

Sections 100 to 125 describe the mode of proceeding to collect the tax on the proceeds of mines, as distinct from the manner of collecting taxes on other personal property, but do not affect the amount or per centage of taxes to be collected.

Section 99 is not necessarily in conflict with Section 1. It should be construed as levying an additional tax to that provided in Section 1, rather as than exempting this species of property from the operation of the general and comprehensive language of the first

section. If it is so construed, then it exceeds the constitutional limit of taxation, and for this reason may be rejected, leaving Section 1 standing. (*Campbell v. Union Bank*, 6 How. Miss. 625.)

Courts should not declare a law unconstitutional for inequality, unless such inequality leads to gross injustice. (*People v. Coleman*, 4 Cal. 55; *Mayor, etc., v. Chollar Potosi Co.*, 2 Nev. 87; *People v. Naglee*, 1 Cal. 252.)

A portion of this tax is due to Ormsby County; as there are no mines in this county the respondent could not be injured, so far as his county taxes are concerned, by a failure of the Legislature to make a constitutional law for the collection of taxes from the mines. The collection of a tax from the proceeds of mines in other counties would not reduce the respondent's *county* taxes in this county.

P. H. Clayton, for Respondent.

The property attempted to be taxed in this case was a mere debt or chose in action. It followed the person of the creditor, and was not within this State after respondent removed to San Francisco, on the sixth of April, 1866.

The law declaring the existence of a lien on all property for taxes to exist from first Monday in April, does not affect this case, for there can be no lien where there is no debt or tax due. The property was gone before the time of assessment for taxes arrived.

The Revenue Law is unconstitutional and void, because the proceeds of mines are only taxed to the extent of one per cent. for both State and county purposes, whilst the other property is taxed at one and a quarter for State, and one and a half for county purposes.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

This was an action brought in the name of the State against the defendant for taxes alleged to be due the State and County of Ormsby for the year 1866. The property upon which the tax was levied consisted of certain choses in action or debts due to defendant.

The defense is two-fold: First, that defendant removed from the State of Nevada on the sixth day of April, 1866; that the chose in action followed the person of defendant, and therefore was not

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taxable in this State after that date ; that the assessment of the property was made after the sixth of April, and was therefore void, and conferred no right of recovery on the plaintiff.

The second ground assumed in defense was, that the ninety-ninth section of the Revenue Act of 1864-5, as amended in 1866, discriminates in favor of the products of the mines, levying a smaller per centage of taxes on them than on other property ; that, for this reason, the tax on other property was in contravention of that Article of the Constitution which requires all taxation to be equal and uniform.

We will examine these points in the order in which we have stated them. The law levying the taxes for the year 1866, was approved February 24th, of that year. The first sentence of the first section of that Act is in these words :

“ An annual *ad valorem* tax of ninety-five cents upon each one hundred dollars' value of taxable property is hereby levied, and directed to be collected and paid for State purposes, upon the assessed value of all taxable property in this State, not by this Act exempt from taxation.”

Another sentence reads as follows :

“ And upon the same property, the Board of County Commissioners, in each county, is hereby authorized and empowered to levy and direct to be collected and paid annually, an *ad valorem* tax for county purposes, a sum not exceeding one hundred and fifty cents on each one hundred dollars' value of taxable property in the county.”

Section 2 of the Revenue Act requires the County Commissioners to make their levy for county purposes, prior to the first Monday of April in each year.

Section 3 declares that a lien shall attach on the first Monday of April in each year, upon all taxable property then in the State. These clauses seem clearly to declare that all property in the State when the law was passed, and which should remain there up to the first Monday of April, should be liable to taxation. There can be no question that the Legislature has a right to tax property belonging to its own citizens, and remaining a portion of the year within its jurisdiction. The citizen could not avoid the payment of the

tax by removing the property after the tax was levied. Respondent, however, claims that this property is to be held exempt, not because it was removed from the State before any levy was made, but before there was any assessment thereof. The Revenue Act requires the County Assessors to make their assessments between the second Monday of May and the second Monday of September, in each year. But this, it appears to us, is wholly immaterial. The tax was *levied* prior to the sixth of April, when defendant left the State. From the moment of the levy there was a duty or obligation imposed on the owner of the property to pay a certain per centage of its value to the State for taxes. The removal of the property from the State before the value thereof was ascertained by the Assessor, might render it more difficult in some cases to ascertain the real value of the property, but could not release the owner from his legal liability to pay the tax when the amount thereof was once ascertained. We think that the property, having remained in the State after the first Monday in April, was clearly liable for both State and county taxes.

The tenth Article of the Constitution reads as follows :

“The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes.”

The first phrase to which our attention is called is this : “A uniform and equal rate of assessment and taxation.” We have no hesitation in saying that the Constitutional Convention, in using the language last quoted, meant to provide for at least one thing in regard to taxation : that is, that all *ad valorem* taxes should be of a uniform rate or per centage. That one species of taxable property should not pay a higher rate of taxes than other kinds of property. If the language we have quoted did not express this idea, then it was perfectly meaningless. The language used may mean much more than this, but it cannot mean less. The Constitution clearly intends to provide against that species of injustice

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which frequently prevails in communities where there is one overshadowing interest: the exemption of the property connected with that interest from its legitimate share of the public burdens.

It is a part of the history of the State known to every intelligent man within its borders, and frequently alluded to in the Constitutional debates, that at the time we were about to frame our State Constitution, those most largely interested in mines insisted they should be exempted from all taxation; that the Constitution should provide for their exemption so as to set this question at rest for at least a series of years. This exemption was claimed for several reasons: one, that the mines gave life and energy to all other kinds of business; that the prosperity of all other business depended on the success of the mines. Another, that mining claims, especially before they were so far developed as to be productive, were of too uncertain a value to admit of a fair valuation for taxation.

On the other hand, the population of the State settled in the agricultural portions thereof asserted that the mines constituted the great portion of the wealth of the State, and that it was highly unjust to relieve them and throw the whole burden of taxes on those counties which were poorest and least able to pay. The result seems to have been a compromise of the extreme views of each party, which is very clearly expressed in the Constitution, and embraces two main propositions: First, that all property assessed for an *ad valorem* tax should be liable to pay the same per centage; second, that unproductive mines should be entirely free from taxation, whilst those which were productive should pay the regular *ad valorem* tax on the products, instead of the same tax on the body of the mine itself. There can be no doubt but it was the intention that the entire product should be taxed, in lieu of the body of the mine. This property is different from all other property in the State. Whilst the products of farms remain in the State until consumed, being generally subject to at least one taxation per annum, the products of mines are removed from the State at the end of each week; so that it is seldom that more than the fiftieth part of the products of any of the principal mines is in the State at one time. Taking these views to be correct, (and we

think there can be no reasonable doubt that they are so) let us look at the sections of the Revenue Law complained of, and see how far they conform to or are in conflict with these views.

The first section of the Revenue Act levies an annual *ad valorem* tax for State purposes of \$1.25, and authorizes a County tax of \$1.50 on *all taxable property* in the State. This is clearly in accordance with that clause of the Constitution which requires "a uniform and equal rate" of taxation. This section seems in every respect unexceptionable. Section 99 imposes on the products of the mines an annual *ad valorem* tax of one per cent. for State and County, say one-half per cent. for State purposes, and an equal amount for County purposes. This clause can receive but one of two constructions: it was either intended to fix the entire rate of taxation for the products of mines at \$1 on the hundred for State and County purposes, in lieu of the \$2.75 fixed for other property; or else, as is contended by appellants, it is really an additional tax on mining products of one per cent. over and above the ordinary tax imposed on other property. In either event, the clause is equally void. The Legislature could neither make the tax greater nor less on the products of mines *than* on other property. Then follows, in the same section, a clause directing the manner of assessing the products of the mines. That clause is in these words: "All of said ores, quartz, or minerals shall be assessed as follows: From the gross return or assessed value per ton of all ores, quartz, or minerals from which gold and silver, or either, are extracted in this State, there shall be deducted the sum of twenty dollars per ton." This clause merely points out the method of finding what is the true value of the ores, which are the primary products of all mines.

We have no doubt the Legislature may direct the method of assessing property, provided the object is to attain a *just* valuation. This Court could not declare any law directing the mode of assessment void unless it manifestly violated those principles of justice which are required by the tenth Article of the Constitution. We see nothing objectionable in this clause. The closing sentence of Section 99 directs a tax to be levied on three-fourths of the value, previously ascertained, of the proceeds of the mine. This is clearly

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unconstitutional. The value once being ascertained, the whole value is taxable at the same rate as all other property.

Section 117 of the Revenue Act, which provides for distributing the one per cent. tax directed to be levied by Section 99, falls, of course, with the opening clause of the last mentioned section. We see no constitutional objection to any other portion of the law.

The question then remains, whether the unconstitutionality of the opening and closing clauses of Section 99, and of the whole of Section 117, destroys the validity of the whole Act; or can the other portions of the Act stand, rejecting these portions which are in contravention of the Constitution?

No principle can be better settled than this: that if a law passed by the Legislature be constitutional as to part of its provisions and unconstitutional as to others, the unobjectionable portion may stand, if by rejecting that which is unconstitutional, the whole object and effect of the law is not destroyed. In this case we may reject all that part of the Act which is in conflict with the Constitution, and have a perfect and complete revenue law. If by rejecting that part of Section 99 which we hold to be in violation of the fundamental law of the State, the products of the mines were left free from taxation, this would vitiate the entire law; for it would have the effect of compelling one portion of the citizens to pay more than their due share of the State burdens.

The first section of the Act levies a tax on all taxable property in the State. That includes the proceeds of mines as well as other taxable property. Other sections direct the method of assessing this kind of property; and if the assessors and tax collectors had only done their duty, disregarding these unconstitutional provisions entirely, the whole tax could have been collected.

That the mines—which constitute the greater part of the wealth of the State—have for the last two years almost entirely escaped taxation, is true. That the failure to collect the due proportion of taxes from them has greatly embarrassed the State, and thrown a heavy burden on that portion of our population least able to bear it, is equally true. But whilst the mines have escaped their share of the public burdens, through the fault and neglect of the assessors

and collectors, it would certainly not be promoting the ends of justice to excuse one-third or one-fourth of all the other tax payers in the State from the payment of their taxes, thus further increasing the burdens of those who have paid their taxes without suit. Such a ruling would neither be in accordance with law, with justice, or public convenience. Tax payers who did not wish to be overburdened by the payment of more than their share of the State expenses should have taken steps to compel the assessors and collectors to do their duty. There can be no doubt the Courts would have afforded relief. Having failed to do this, no tax payer can be allowed to set up the illegal conduct of these officers as a defense to an action brought against him for his taxes.

In the case of *Exchange Bank of Columbus v. Hines*, 3 Ohio State Reports, 1, the same constitutional questions arise as in this case, and the Court arrives at the same conclusions as ourselves. The principal opinion (written by Chief Justice Bartley) is a very clear exposition of the law bearing on the constitutional branch of this case. It is so ably and clearly written that we have thought it hardly worth while to go into a more lengthy discussion of the points involved. We refer to that opinion, as expressing our views more clearly than we ourselves could express them.

The judgment of the Court below is reversed, a new trial granted, and the cause remanded for further proceedings.

Having been counsel, JOHNSON, J., did not participate in this decision.

Hawthorne and Wife v. Smith.

W. A. HAWTHORNE & WIFE, APPELLANTS, v. T. G. SMITH,
RESPONDENT.

Does the Constitutional provision for protecting "a homestead as provided by law," absolutely protect a homestead of such dimensions and value as the law then in existence or thereafter to be made, might prescribe, or does it only require the Legislature to pass a law protecting a homestead upon such terms and conditions as the law may impose—*Quere?*

It is clearly the intention of the Constitution to protect a debtor's homestead from forced sale. It is equally clear the Legislature intended to effectuate that intention. This being the policy of the law, creditors will not be allowed to defeat its object unless the statute clearly gives that right, or clearly points out the contingency upon the transpiring of which the debtor will lose his exemption.

Property which possesses the characteristics of a homestead may be selected and recorded as such at any time before actual sale under execution. The levy of an attachment will not prevent such selection.

When a Court grants a temporary restraining order, and makes a rule on the defendant to appear at chambers and show cause why a *perpetual* injunction should not be granted, this, although irregular, is not injurious to defendant, if at chambers the injunction is made only to operate until a hearing on the merits.

Where a complaint in the nature of a bill in equity sets out distinctly most of the facts necessary to entitle the plaintiff to the relief sought, but omits one or two material allegations or facts, and these facts are clearly stated and admitted in the answer, the answer may be held to aid the complaint and sustain the action. This was so under the former Chancery practice, and is more especially the case under the liberal rule prescribed by the seventy-first section of the Practice Act.

APPEALED from the District Court of the First Judicial District,
Hon. S. H. WRIGHT, presiding.

R. M. Clarke, for Appellants.

1st. It is the purpose and spirit of the law to exempt from sale on execution the family residence or dwelling actually occupied as such. And it is the actual occupancy coupled with the intention to make it a home that impresses the premises with the character of homestead.

2d. That portion of Section 2, of the Homestead Act of March 6th, 1865, which provides for the selection of the homestead, and prescribes the manner of the selection, is directory merely. (*Goldman v. Clark*, 1 Nevada Reports, 611; Act 1861, p. 24, Sec. 1.)

The homestead (if occupied) exists without the declaration of claim.

Furthermore, as no time is prescribed within which the declaration of claim shall be made, (Act 1864-5, p. 225, Sec. 1) and it is manifestly the intention of the law to exempt a homestead from forced sale, the declaration may be made at any time.

3d. The Constitution of Nevada *ex proprio vigore* exempts a homestead from forced sale. (Const. Art. IV, Sec. 30; Const. Debates, 284, 303, 304, 314.) To impress the character of homestead upon the premises no act is required except occupancy as a family residence; no "selection" is required, no declaration, acknowledgment, or recordation of claim is required.

It was beyond the power of the Legislature to impose any additional terms, conditions, or requirements upon the Constitution. If that portion of the Homestead Act of March 6th, 1865, requiring "selection," declaration in writing, acknowledgment and recordation of homestead is not merely directory, then it is unconstitutional, because while the Constitution absolutely and unconditionally exempts a homestead from forced sale, the statute attaches conditions and requires acts to be done to perfect that which the Constitution peremptorily guarantees.

The law divests vested rights.

4th. The decisions of the Supreme Court of California, which held a claim and recordation necessary, are not authority in point; because made under constitutional and statutory provisions entirely different from ours. (*Cary v. Tice*, 6 Cal. 630; 13 Cal. 649; 24 Cal. 639-640.)

The Constitution of California does not create a homestead. (Const. Cal. Art. XI, Sec. 15.) The Constitution of Nevada does. (Const. Nev. Sec. 30.)

The laws of California provide that, after June 1st, 1862, "No property shall be deemed a homestead * * * unless the declaration provided for in this Act shall be made and filed for record, as provided by law." (Laws Cal. 1862, p. 520, Sec. 6.)

The laws of Nevada contain no such provisions. (Act 1864-5, pp. 225-6.)

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Geo. A. Nourse, for Respondent.

The Homestead Law of 1865 superseded the law of 1861, before plaintiff occupied the homestead in question. He can claim nothing under the law of 1861.

The Constitution *ex proprio vigore* gives no homestead exemption. It merely exempts from forced sale "a homestead, as provided by law."

Had there been no homestead law on the Territorial Statute-book, there would have been no homestead exemption until the law of 1865. The only homestead exemption now existing is "as provided by" that "law."

That law provides that a homestead shall be exempt, "to be selected by the husband and wife, or either of them, or other head of a family, etc." (Laws of 1865, p. 225.)

The same section further provides that "said selection shall be made by either the husband or wife, or both of them, or other head of a family declaring their intention, in writing, to claim the same as a homestead," etc., etc.; said declaration to be signed, acknowledged, and recorded.

We claim that until such written declaration is made, signed, acknowledged, and recorded, as provided in that section, there is no exemption.

The homestead exemption is created by, and is based *wholly* upon Statute Law, or constitutional provisions. Hence the party claiming the right or privilege must accept of it, if at all, under just the qualifications and conditions, neither fewer nor different, under which the law gives it. He must, by his pleading and proof, bring his case within the provisions of the law. (*Helfenstein v. Gore*, 3 Iowa 287; *Beecher v. Baldy*, 7 Mich. 501; *Walters v. People*, 18 Ill. 194; *Kitchell v. Burgoine*, 21 Ill. 44.)

When the statute or constitutional provision giving right to such exemption requires those claiming thereunder to take certain steps to obtain the benefit of the exemption, the requirements of the statute must be pursued before the levy. (*Manning v. Dove*, 10 Rich. S. C. Law, 395; *Frierson v. Westburry*, 11 Rich. 353; *Helfenstein v. Gore*, 3 Iowa, 292; *People v. Plumsted*, 2 Mich. 469; *Frost v. Shaw*, 3 Ohio Stat. 273; *Clark v. Potter*, 15 Gray,

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21; *Lawton v. Bruce*, 39 Maine, 484; *Pinkerton v. Tumlin*, 22 Geo. 165; *Herschfeldt v. George*, 6 Mich. 456.)

And the wife and children are in such cases affected by the failure or default of the head of the family to do what the statute requires. (*Davenport v. Alston*, 14 Georgia, 271; *Crow v. Whitworth*, 20 Geo. 38; *Tadlock v. Eckles*, 20 Texas 782; *Brewer v. Wall*, 23 Ib. 589; *Getzler v. Saroni*, 18 Ill. 518; *Simpson v. Simpson*, 30 Ala. 225.)

When such is the requirement of the statute, there must be not only ownership and occupation, but a *selection* of the premises as a homestead. (*People v. Plumsted*, 2 Mich. 469; *Beecher v. Baldy*, 7 Ib. 503-5.) Same doctrine by implication held in *Cook v. McChristian*, 4 Cal. 23-6; *Reynolds v. Pixley*, 6 Cal. 165.

The pleadings are defective, and do not show facts to justify an injunction.

The rule is to show cause why a *perpetual* injunction should not be granted. This is manifestly wrong. The statute provides for: 1st, a restraining order; 2d, a temporary injunction (to be granted in a proper case at chambers); 3d, a *perpetual* injunction after trial on the merits.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

In the month of March, 1866, appellants moved into a house which, with the land attached thereto, is now the subject of litigation. In September of the same year one Robert Woodburn brought suit against W. A. Hawthorne, and at the time of bringing suit sued out a writ of attachment and had it levied on this house and grounds. In December of the same year judgment was rendered in favor of plaintiff, and in the early part of the year 1867 execution was issued and the property previously levied on under the attachment was advertised for sale. In October, 1866, (after the attachment levied, but before judgment) the appellants filed a declaration of homestead on the property now in dispute. When the Sheriff advertised the property for sale the appellants filed their bill praying an injunction to restrain the sale, and claiming that the property was exempt under the Constitution and Homestead Act. The District Judge issued a temporary restraining order, and re-

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quired the defendant, Smith, who is Sheriff of Ormsby County, to show cause at a certain day why a perpetual injunction should not be granted. At the hearing of this rule the Judge refused to grant an injunction, and discharged the restraining order. From this ruling in regard to an injunction the plaintiffs appeal.

It is admitted by respondent that the property claimed is in every respect such as might have been claimed as a homestead if the declaration of intention to so claim it had been filed in time. The question to be determined by us is, whether the levy of an attachment gave the attaching creditor such a vested interest in the property as to deprive the appellants of the right to claim it as a homestead. The thirtieth section of Article IV of the Constitution provides :

“ A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists ; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon ; *provided*, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife ; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated.”

At the first session of the Legislature held after the adoption of the Constitution a Homestead Act was passed. The first and second sections of that Act, which are the only ones throwing any light on this subject, are as follows :

“ The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any Court, for any debt or liability contracted or incurred after November 13th, in the year of our Lord one thousand eight hundred and sixty-one. Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead.

Said declaration shall state that they, or either of them, are married, or if not married, that he or she is the head of a family; that they or either of them, as the case may be, are at the time of making such declaration residing with their family, or with the persons under their care and maintenance on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead; which declaration shall be signed by the party making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants."

"Such exemption shall not extend to any mechanic's, laborer's or vendor's lien, lawfully obtained; but no mortgage or alienation of any kind, made for the purpose of securing a loan or indebtedness upon the homestead property, shall be valid for any purpose whatsoever; *provided*, that a mortgage or alienation to secure the purchase money, or pay the purchase money, shall be valid if the signature of the wife be obtained to the same, and acknowledged by her separately and apart from her husband; nor shall said homestead property be deemed to be abandoned without a declaration thereof in writing, signed and acknowledged by both the husband and wife, or other head of a family, and recorded in the same office, and in the same manner as the declaration of claim to the same is required to be recorded, and the acknowledgment of the wife to such declaration of abandonment shall be taken separately and apart from her husband; *provided*, that if the wife be not a resident of this State, her signature and the acknowledgment thereof shall not be necessary to the validity of any mortgage or alienation of said homestead before it becomes the homestead of the debtor."

The first point of discussion which arises in this case is as to what interpretation should be given to the phrase "a homestead as provided by law," which is found in the first line of the constitutional provision. The appellants contend that "as provided by law" merely means of such size and value as the law may prescribe. That, as there was already a Territorial law in existence which exempted a homestead to the value of five thousand dollars, no legis-

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lation was necessary to carry the constitutional provision into effect ; that no Legislature could impose restrictions or terms upon which the exemption from forced sale was to depend ; that the existence of a homestead depended on occupancy and use of a house and premises as a permanent residence ; that when the existence of a homestead was once established, it became sacred under the Constitution, and the Legislature could make no law subjecting it to forced sale, however the parties occupying it might fail to comply with any law requiring a selection and recordation thereof ; that the only control the Legislature has on this subject is to increase or diminish the extent and value of the homestead. On the other hand, the respondent contends that this constitutional provision only requires the Legislature to exempt the homestead from forced sale, and in effect authorizes the Legislature to make the exemption on such terms and conditions as they choose to impose.

It is difficult to determine which of these interpretations should be adopted. In this case it is perhaps not necessary to determine this question. Even taking the respondent's interpretation, it is evident the Constitution intended that at all times the homestead of a family should be exempt from forced sale, except in a few enumerated cases. It is equally evident the Legislature intended to carry out this policy of exempting the homestead. If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right, or clearly points out the contingency, upon the happening of which the debtor should lose the benefit of the exemption. Here the property was clearly a *homestead in fact*. If it lacked anything of being such a homestead as the law exempts, it was only the execution and filing for record of a declaration by the husband and wife, or either of them, that they had selected it as such. Upon the filing of such declaration the statute says it shall be exempt. It is hardly claimed by respondent that the existence of debts, or the actual insolvency of appellants at the time of filing, would have affected their right to select the homestead and claim the exemption. If, then, the prior insolvency of a party will not prevent his claiming the exemption, we see no reason why an attach-

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ment should. The law declares property thus selected shall be exempt from execution. It makes no exceptions. It is no greater hardship to exempt it from an attaching creditor than any other creditor. The object of the attachment law is not to allow the creditor to seize property which is exempt from execution, but to secure that which is liable to such process. As the law is totally silent as to the time when a selection shall be made of the homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that, after the selection is made and filed for record, no levy upon, or sale of the homestead property, can be legally made, except for those classes of debts mentioned in the Constitution.

The point that the Judge, after granting the restraining order, directs the defendant to show cause why a *perpetual* injunction should not be granted, instead of making an order to show cause why an *injunction* should not be granted, is rather technical. Undoubtedly the proper practice is: first, a restraining order; second, on hearing defendant at chambers, an injunction; thirdly, a perpetual injunction on the final hearing. But a mere mistake in the wording of the restraining order is no ground for refusing the proper relief on the hearing.

Respondent contends that the Court below was right in refusing the injunction, because the complaint was defective in not stating that the plaintiffs had selected the property in controversy as a homestead, and caused the declaration of their selection to be recorded as required by law. In this respect the complaint is undoubtedly defective; and if that defect had not been cured by the answer, we would have been compelled to hold that the Court below was correct in refusing to grant an injunction on so defective a complaint. In this case the plaintiffs state distinctly all the facts necessary to entitle them to the relief sought, except the selection and recordation of the homestead claim. This fact they fail to state. Nor do they state any fact from which the Court could infer that the recordation of a claim had been made before levy of execution.

But the defendant states distinctly the date when the plaintiffs

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filed their declaration of homestead for recordation. The question then is, does this statement in the answer cure the defect in the complaint? It is said that a complainant in a bill in equity must make out a case by his own bill, or he is not entitled to relief, although the answer may set out enough facts, when added to those things alleged in the bill, to entitle the complainant to relief.

This may be the correct general rule, but still the rule is not carried out in all its strictness. Both English and American Courts have frequently allowed the answer to aid the bill, so as to grant relief that they could not have granted if there had been no answer at all.

In a note to Daniels' Chancery Practice, page 411, the editor uses this language: "But when the facts stated in the bill are disproved, or are defectively stated, relief may be granted upon the facts stated in the answer."

For this rule a reference is made to two Tennessee and two Kentucky cases. The Kentucky cases seem to sustain the text. The Tennessee cases we have not. In the case of *Rogers v. Soutten*, 2 Ken. 598; 15 Eng. Ch. R., the Court granted relief on a case made by the answer quite different from the one made in the bill. We conclude that Courts of Equity, under the old practice, would sometimes allow the answer to aid a defective bill. The seventy-first section of our Practice Act provides as follows:

"Section 71. The Court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect."

It is impossible to suppose the defendant could have been taken by surprise by the Court acting on a fact so distinctly stated in the answer. Nor, under the very liberal direction of our statute, do we think that there would have been any impropriety in the Court below acting on the facts as they are made to appear by the pleadings, allowing the answer to come in aid of the complaint.

The judgment of the Court below must be reversed. That Court will grant an injunction pending this action, and take such further steps as the equity of the case may require.

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JOHNSON, J., having been counsel in the Court below, did not participate in this decision.

RESPONSE TO PETITION FOR REHEARING.

Opinion by LEWIS J., BEATTY, C. J., concurring.

The first point made by counsel for respondent in his petition for rehearing is, that this Court erred in holding that the allegations of the defendant's answer cured the defect in the bill, and several cases are referred to as announcing a different rule. But of those cases cited by counsel which we have been able to examine, not one of them sustains the position assumed by him.

In *James v. McKernon*, 6 John. 543, it was simply held that "the Court could not afford relief not sought for by the bill, nor entertain the question of fraud, which was not so much as suggested by the pleadings."

Surely, at this day, no precedent is required to maintain a rule so thoroughly settled and so strongly recommended by the soundest and clearest principles of general utility. The Chancellor in that case set aside, upon the ground of fraud, a certain agreement or deed upon which the defendants based their defense, although relief was not sought upon that ground, nor was fraud alleged in the pleadings. As the plaintiffs in their bill did not attempt to attack the validity of the deed upon the ground of fraud, nothing is clearer than that they could not prove fraud or recover upon that ground. And the reason is clearly given by Chancellor Kent in delivering the opinion of the Court.

"The good sense of pleading," says the Chancellor, "and the language of the books, both require that every material allegation of this kind should be put in issue by the pleadings, *so that the parties may be duly apprized of the essential inquiry, and may be enabled to collect testimony and frame interrogatories, in order to meet the question.* Without the observance of this rule, the use of the pleading becomes lost, and parties may be taken at the hearing by surprise." We do not find a solitary expression in that case which is in conflict with the rule as announced by this Court in its

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original opinion. The question whether a direct statement in an answer would cure a defective allegation in the bill, was not so much as mentioned in the case. The question in *Crockett v. Lee* 7 Wharton, 522, is precisely the same as that passed upon in *James v. McKernon*. The point before the Court is clearly shown by the following statement made by the learned Chief Justice who delivered the opinion of the Court :

“The testimony which has been taken in these causes certainly is very strong in support of the decrees of the Circuit Court ; but the counsel for the appellant contends that so much of this testimony as respects the vagueness of Cameron’s location must be disregarded, because neither its vagueness nor its certainty has been put in issue. Lee has not averred in his bill nor alleged in his answer that this location is vague ; nor has he anywhere or in any manner questioned its validity.”

So the Court held that relief could not be granted upon evidence making out a case different from that presented by the pleadings. Because, says the Court : “ If the pleadings in the cause were to give no notice to the parties or to the Court of the material facts on which the rights asserted were to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited—if a new case might be made out in proof differing from that stated in the pleadings—all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations as well as to the proof of the parties is not only one which justice requires, but one which necessity imposes upon Courts.”

Attention is also called to a doctrine of Mr. Justice McLean in the case of *Jackson v. Ashton*, 11 Peters, 229, where it is said : “That no admissions in an answer can under any circumstances lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill.”

As we interpret this language, it certainly does not conflict with the rule which was answered by this Court in its first opinion. The opinion evidently intended to be conveyed by Mr. Justice McLean was, that the admissions of an answer are not admissible to make

out a case for the plaintiff different from that which he has attempted to make out by his bill, or to afford him relief upon grounds different from those upon which he sought it in his complaint. And such is doubtless the correct rule of law. But we can find no case where it has been held that a direct allegation or admission in an answer, of some one fact which was omitted from a complaint, otherwise complete, and clearly showing the relief sought, would not cure such defective complaint. On the contrary, the case of *Rogers v. Sauton*, referred to in the first opinion, and which was a suit in chancery, fully supports the rule as we have announced it, and Mr. Chitty states the rule at law in the following manner :

“If, however, the adverse pleading expressly admit the fact which ought to have been stated in the defective pleading, and which is substantially incorrect in omitting it, the error becomes, it seems, immaterial.” (1 Chitty on Pleading, 672.)

No hardship or injury can possibly result from such a rule.

The principal object of pleading is to succinctly and intelligibly present the facts upon which relief is sought to the Court, and to notify the respective parties of the character of case which they will have to meet. The complaint, in this case, clearly notifies the defendant of the character of the plaintiff's case ; and although it is not completely made out by reason of an omission to allege a fact material, and upon which the right of recovery depended, yet his case is perfected by an admission in the answer of the omitted fact. Thus, the plaintiff's case is fully presented to the Court by the pleadings. If, under such circumstances, the relief awarded to the plaintiff be in conformity with that sought by him, and it is justified by proof legitimately admitted under the pleadings, the defendant cannot complain that he was injured by the defect in the complaint. Upon this point, therefore, we are satisfied that the correct rule was announced in the original opinion.

We see nothing in the other point made by counsel for respondent. True, the rule made by the Court was to show cause why a perpetual injunction should not issue ; but clearly the respondent could not be misled by what seems a mere clerical misprision. And indeed, the record shows that he was not ; for it appears, the question argued upon the hearing was, whether a temporary injunc-

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tion ought to issue; and the appeal is from the order refusing temporary and not a final injunction.

Rehearing denied.

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An express promise to pay a certain sum of money as damages for a tort previously committed would create a contract upon which an action might be maintained; but the law does not presume a promise to pay from the tort itself.

It is as necessary, under our system of practice, to maintain in pleadings the distinction between actions arising out of torts and those growing out of contracts, as it was under the old practice.

If the pleading be upon contract, a recovery should not be allowed if the proof be of a trespass, from which there could be no presumption of a contract.

In all actions for the recovery of money, the jury should always find the amount which the successful party is entitled to recover. A mere finding for the plaintiff, without assessing the sum to be recovered, is not sufficient. As the value of the property at the time of the conversion is not the true measure of damage, a general finding of its value is not a sufficient assessment of the sum of money to be recovered by the successful party in an action for the wrongful conversion of such property.

A special verdict must expressly present all the material facts, so that nothing shall remain for the Court but to draw from them the conclusions of law.

APPEAL from the District Court of the Second Judicial District, Ormsby County, Hon. S. H. WRIGHT, presiding.

The facts are sufficiently stated in the opinion of the Court.

Geo. A. Nourse and *A. C. Ellis*, for the Appellant.

The verdict in this case fails to comply with the statute, in that the jury finding for the plaintiff in an action for the recovery of money, fails to find the amount of that recovery. (Laws of 1861, 343, Sec. 176.)

Under this statute it is made the duty of the jury to "find the amount of the recovery." The Court is not allowed to do it. It is no compliance with this requirement for the jury to furnish the *data* on which the Court may find this amount. Even at common law the jury must find the amount of the recovery.

Our statute is too explicit to be possibly misunderstood. (See form of Postea at law ; Stephens on Pleading, pp. 87-8 ; and form of judgment based thereon, p. 114 ; showing that the jury must always assess the damages.)

Even had the defendant in this action been defaulted, the damages must have been assessed by a jury, unless the examination of a long account were necessary, in which case a referee must examine and report. (Laws of 1861, 339, Sec. 150, subd. 2.)

So also if the defendant had only denied the value of the property, admitting by his silence the other allegations of complaint.

But this verdict fails even to furnish the data for an assessment of damages by the Court, if that were allowable. It does not show the value of the property at the time of taking.

The plaintiff showed no cause of action, in that the complaint does not allege that the pretended wrongful acts of defendant have damaged plaintiff.

The allegation of indebtedness, and a "legal promise to pay" from the facts pleaded, is simply absurd.

The verdict is in no sense a special verdict, as defined in Sec. 174 of the Civil Practice Act ; nor is it claimed to be by the respondent.

It is palpably a blunder of the jury, drawn by some jurymen who had sat on a jury in an action for recovery of possession of personal property, and had there learned the form of a verdict in such an action. (See Sec. 177 of Civil Practice Act.) He evidently imagined that to be the proper form of a verdict in all civil actions. But his mistake does not change the law. The verdict is as fatally defective in this action as a verdict for so much money would be in such action.

Robert M. Clarke, for Respondent.

The verdict is responsive to the issues made by the pleadings. The only controversy was as to the *ownership and value* of the property—the *value* being the measure of damages demanded for the conversion.

The jury find generally for the plaintiff, and determine the value of the property to be \$6,308. This finding is neither ambiguous,

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insufficient, nor uncertain. It covers *all* the issues, and may be easily understood by the Court.

A verdict, however informal, is good, if the Court can understand it. (Hillyard on New Trials, 107, Secs. 19, 20, 21, 22, 22a; 12 Ind. 274; 16 Conn. 346; 2 Met. (Ky.) 88; 9 Foster, 63; 10 N. H. 514.)

The verdict of a jury is sufficient, although it be informal, and do not find in terms the issue submitted to them, if it find the very matter on which the issue depends and from which it is necessarily concluded. (39 N. H. 247.)

The complaint states a good cause of action. Under the code, all *forms* of action are abolished; or more correctly speaking, all forms of action are merged into *one*, and all technical averments are swept away.

It is now only necessary to plead the *facts*, and if the facts pleaded constitute a cause of action, the complaint is good.

The objection to the complaint taken in this Court, for the first time, is that no "demand" is averred. Generally, the averment that the defendant did "wrongfully and unlawfully convert the said goods and chattels to his own use and benefit," is sufficient. (See form in Nash's Practice, 246, and note of Judge Nash on p. 247.)

But granting the objection good on demurrer to the complaint, it is not available in this Court at this time:

1st. Because the defective averment is cured, and supplied by the answer of the defendant, *which admits a sale of the property by the defendant*.

If a defendant rightfully in possession of goods, sells them, this is a conversion; and in such case it is unnecessary to allege "demand," the averment of sale being sufficient. (14 Mass. 157; 9 Pick. 62; 12 Pick. 521; Van Sandfordt's Pleadings, Vol. 1, p. 276; Vol. 2, p. 492; 3 Wend. 406; 10 Wend. 389.)

While the complaint does not specifically aver that the "defendant sold," etc., the answer admits the sale, and thus aids the complaint and cures the defect. (Chitty Pl., Vol. 1, p. 672; Van Sandfordt's Pl., Vol. 2, p. 832.)

2d. The objection is cured by verdict, and cannot be taken advantage of for the first time in the Appellate Court. (16 Mass.

p. 94; 17 Mass. 229; 9 Mass. 198; 10 Cal. 561; 21 Cal. 576.)

The omission of the allegation of a "wrongful taking," in replevin, is cured by verdict. (1 Minn. 134.)

After going to trial without objection, a party cannot object to pleadings which might have been remedied by amendment. (10 Ohio, 493.)

If a declaration, though not strictly formal, set forth a substantial cause of action, and the defect be one that was amendable in the Court below, it is cured by the verdict. (34 Penn. 324; 9 Ohio, 43; 35 N. H. 357.)

The grounds of appeal are technical and without merit, and it is greatly to be hoped that the verdict of a jury will not be disturbed, and the judgment of a Court reversed, for the unsubstantial reason that the jury in a case where the value of the property in controversy furnished the only legal measure of damages under the pleadings, found the "value of the property," etc., instead of finding formally the "damage of the plaintiff," etc.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

This action was brought to recover the value of certain personal property alleged in the complaint to have been "wrongfully and unlawfully converted" by defendant to his own use and benefit. After this allegation of a tortious conversion, follows the averment that the defendant "did then and thereby become indebted to the said plaintiff for the price and value of said property, to wit: in the sum of eight thousand three hundred and twenty-nine dollars and ninety-eight cents, (the alleged value of the chattel property) which said sum the said A. H. Hall then legally promised and agreed to pay to the plaintiff." This pleading is decidedly novel in its form, and, as a complaint in assumpsit, is vitally defective. The tortious conversion is fully charged; and it is alleged that thereby, that is, by means of the trespass, the defendant became indebted and promised to pay. The only inference to be drawn from the language employed by the plaintiff is, that a promise to pay for the value of the property was implied by reason of the wrongful conversion by him. An express promise to pay a certain sum of money

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as damages for a tort previously committed, would doubtless create a contract upon which an action might be maintained, but most clearly the law will never presume a promise or agreement to pay from the tort itself. (*Carson River Lumbering Company v. Bassett et als.*, 2 Nev. 249, and cases there cited.)

Though the old rules of pleading have been much relaxed by codes of Procedure and Practice Acts, yet the substance of the old pleadings is still required, and it is as necessary under our system to maintain in the pleadings the distinction between actions arising from torts and those growing out of contracts, as it was at Common Law, for this reason if no other: that the Court may know whether a counter claim is or may be properly pleaded or not. Under our practice, a counter claim arising upon contract cannot be pleaded by a defendant to an action brought to recover damages for a trespass. Nor can unliquidated damages arising out of a tort be pleaded as a counter claim in an action brought upon contract.

By the forty-seventh section of the Civil Practice Act it is provided that a counter claim must be—

“First—A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff’s claim or defendant’s defense connected with the subject of the action.

“Second—In an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action.”

Hence as the defense which the defendant is permitted to make may to some extent depend upon the character of action made out by the complaint, the plaintiff should be compelled to show clearly by his pleadings whether his action is based upon tort or contract. If he pleads a contract, he certainly ought not to be allowed to recover by the proof of a trespass, or of facts from which there could be no presumption of a contract. If he were allowed to recover by proving a tort when he has pleaded a contract, the defendant might be deprived of most material rights; because notwithstanding he may have had a valid claim upon contract against the plaintiff, he could not properly plead it as a counter claim in an action brought against him to recover unliquidated damages. Facts

should not therefore be so stated in a pleading as to render it uncertain whether the complainant's action is upon contract or tort. Because, under our practice, the pleadings are to be liberally construed, with a view to substantial justice between the parties, it does not follow that the substantial rules of pleading can be disregarded and that every hotch-potch of inconsistent facts indorsed "complaint," or "answer," is to be deemed a sufficient pleading.

If the allegation of indebtedness and promise to pay could be treated as surplusage in the plaintiff's pleading in this case, it would not even then perhaps be sufficient as a complaint in the nature of trover, which is probably the action that should have been brought. But as the defects in the complaint are possibly not of a character to be taken advantage of on appeal, we only refer to them for the purpose of suggesting an amendment before the cause is again tried.

Whatever may be the character of the action, whether it be in the nature of trover or assumpsit, the verdict of the jury is evidently informal and defective.

In all actions for the recovery of money, the jury should always find the amount which the successful party is entitled to recover. A mere finding for the plaintiff or defendant without assessing the sum to be recovered is not sufficient. In this case the jury returned the following as their verdict: "The undersigned jurors in the above entitled cause find a verdict for the plaintiff, and assess the value of the property at six thousand three hundred and eight dollars."

The general finding for the plaintiff was doubtless sufficient upon all the issues raised by the pleadings except the amount of money which he was entitled to recover. Instead of that the jury found the value of the property. So far as the damages to be recovered by the plaintiff are concerned, the verdict is special. One fact is found which is indispensably necessary to be ascertained in assessing the damages in a case of this kind: that is the value of the property tortiously converted. Its value at the time of conversion is usually the least sum which the plaintiff is entitled to recover. But its value at any other time may be much more than he is entitled to recover. If there were no fluctuation in the value of personal property, a finding of its value upon such pleadings as those which

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are presented to us would perhaps be a sufficient assessment of the damages to be recovered, because the successful party would in such case be at least entitled to the value of his property. But as the Courts recognize the fact that the value of personal property is liable to fluctuation, the measure of damage in a case of tortious conversion is usually its value at the exact time of conversion. It is clear that the property in question may have been worth double or treble the sum a week before the conversion that it was at the time of conversion. Hence the time when the value of the property is fixed or ascertained, was a most material fact to enable the jury or the Court to arrive at the correct sum to be awarded as damages. The jury, instead of presenting the general conclusion—that is, the amount to be recovered by the plaintiff—simply found and returned one of the collateral facts (the value of the property) upon which their general conclusion would necessarily have been based. That finding may or may not be the correct measure of damage.

Six thousand three hundred and eight dollars may have been the value of the property at the time of conversion, or at any other time. There is nothing in the verdict of the jury to make it certain that that is the correct amount for which the plaintiff should have judgment. The Court cannot presume that the sum assessed was the value of the property at the time of conversion. A special verdict must expressly present all the material facts, so that nothing shall remain to the Court but to draw from them the conclusions of law. (Practice Act, Sec. 174.) And such facts should be found, that the Court may be satisfied beyond a reasonable doubt that the conclusion which it draws from, and the judgment which it renders upon them, is correct and proper as between the parties. Had the jury in this case found the value of the property *at the time of the conversion*, we should be disposed to hold the verdict sufficient; but as it is, it is altogether too uncertain and defective.

Judgment reversed, and new trial ordered.

UPON REHEARING.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

As we were not very thoroughly convinced that we were correct in the conclusion arrived at in the first opinion rendered in this case, we permitted a reargument; but, after a full discussion as to the sufficiency of the verdict, we are still inclined to adhere to our former decision, believing it to be correct.

Section 176 of the Practice Act declares that "when a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery." Does the verdict of the jury in this case meet the requirement of this section? Did the jury find the amount of the recovery? Certainly not. If it could be assumed that the jury found the value of the property at the time of the unlawful conversion, such finding would perhaps be sufficient as a special verdict upon which the Court could render judgment; (Practice Act, Sec. 174) or it might be sufficient as a general verdict, for it would be a finding of the amount of money which the law absolutely makes the exact measure of damage. But such fact cannot be assumed to aid a defective verdict; therefore, as the complaint does definitely fix the time of conversion, and the finding is simply of the value, without stating the time at which such value was fixed, it is left uncertain as to whether the value as found by the jury is the correct measure of damage or not. Hence, the finding of the jury is not sufficient as a general verdict, because it does not find "the amount of the recovery," nor any data absolutely fixing that amount; neither is it sufficient as a special verdict, for the reasons which were stated in the original opinion in this case.

Our former judgment is affirmed.

JOHNSON, J., having been counsel in the Court below, does not participate in this response.

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- A writ issued against and served on a party which does not run in the name of "the State of Nevada," or purport to be by the authority of the "State of Nevada," confers no jurisdiction on the Court over the party named in the writ. But if a party on whom such a defective writ has been served comes into Court, and petitions for time within which to answer such writ, he thereby acknowledges the authority and jurisdiction of the Court, and waives all defects in the form of the writ.
- The statute, having prescribed what shall be an appearance for certain purposes, does not preclude an appearance in a different manner for other purposes.
- Although an alternative writ of mandamus may not properly be returnable in less than ten days after its issuance, yet if the respondent appears upon such writ and asks for time to make his answer, and that time is granted, he cannot afterwards be heard to complain that the writ was irregular as to the time when a return was required.
- A general appearance not only waives defect in a writ, or summons, but gives jurisdiction over the person in cases where the writ was void.
- As the affidavit on which an alternative writ of mandamus issues is required to be served with the writ, and it is the affidavit and not the writ which is required to be answered, it would seem unnecessary that the latter should contain all the allegations of the affidavit.
- The power conferred on this Court by the Constitution to issue writs of mandamus, *quo warranto*, etc., is an original jurisdiction, and not merely auxiliary to its appellate jurisdiction.
- The existence of corporations created in other States will be recognized by the Courts of this State. The power of the corporation, or of its officers under the laws of the State where created, will be inquired into in the Courts of this State when necessary to determine controversies arising here.
- Officers of a corporation are not recognized as such in a State in which the corporation does not exist. But a foreign corporation may have agents in any State.
- There may be no *office*, technically speaking, to which relator may lay claim, yet he may have a *right* to represent the corporation as its agent; and the writ of mandamus, under our statute, is the proper mode for restoration to such right. The remedy afforded by this writ, under our statute, is broader than at common law.
- The Court has jurisdiction to determine the rights of the individuals within its jurisdiction, each claiming under a foreign corporation, although it may have no jurisdiction over the corporation itself.
- There being no other speedy and adequate remedy for the relator, mandamus is the proper remedy in the case made.
- Mandamus is the proper remedy to put one into an office where the title of the relator is clear, and no other person is claiming the office under color of right.

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Where the affidavit for an alternative writ of mandamus shows that the relator was appointed to a certain office, or agency, by the board of trustees of a foreign corporation, at a meeting of such board, legally called, an answer denying the legality of the call, appointment, etc., without stating any facts to show the illegality of the call, the meeting, and action of the board, raises no issue of fact, and is a mere nullity.

It being shown by the affidavit and answer that the relator was entitled to the office when he applied for the alternative writ, and so also when the original answer was filed he is entitled to his costs incurred up to that time.

A supplemental answer having shown that relator was legally removed from office, and defendant appointed since the filing of the original answer, the peremptory writ must be refused.

Where the law creating a corporation requires that the stockholders shall elect trustees annually, at such time, place, and manner as may be determined by the by-laws, the election must take place substantially every twelve calendar months. A set of trustees, holding office, cannot by a by-law extend their own term for three months beyond the period for which they were originally elected.

Trustees of a corporation can lawfully do nothing against the interest of the corporators, or to deprive them of their reserved rights.

No elective officer has a right to do any act which would prevent the election of his successor at the time fixed by law for such election.

THIS was an original application to this Court for a writ of mandamus.

When the writ was first applied for, Hillyer & Whitman, who were the regular attorneys and counsel for the Overman Silver Mining Company, represented the relator. Subsequently, when the new board of trustees of that company met, and by their action removed the relator and reinstated the respondent in the office of superintendent, Hillyer & Whitman ceased to represent the relator, and he substituted Mesick & Seely as his counsel. No decision in the case had been rendered before the meeting of the new board of trustees, and by consent their action was introduced into the case by an amended answer; and the case then came up for adjudication, not upon the facts as they appeared by the original affidavit when the writ was granted, but as they appeared by the amended answer, the replication thereto, and the admissions of the parties. The facts, as they were finally admitted to exist, sufficiently appear in the opinion of the Court.

Mesick & Seely made the following points:

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There appearing no abuse of authority on the part of the Board of Trustees of the Overman Company in amending the by-law so as to make the annual election come off in October instead of July, the entire question before the Court is, whether the Board possessed any power for any cause to make the postponement. It is evident that by making the election to fall upon any named day of the week or month, the election could not be held annually, in the strict sense of that term contended for by relator; for in the one case the same day of the week would not fall at the exact end of the year, and in the other it would sometimes fall on Sunday, in a series of years. The time is held as directory, and Courts do not and could not act strictly upon the principles of construction contended for by respondent. (Opinion of Court in *People v. Runkle*, 9 Johnson, 147; also in *Hughes v. Parker*, 20 N. H. 58.)

The principle must be inviolable by either Board or Court, or else there is none involved preventive of the action in question, had on the part of the Board amending the by-law, so as to make the annual election happen in October instead of July.

But we are construing a statute of the State of California, and no principle or precedent appearing to the contrary, we must or should adopt such a construction of their laws as is sustained by the highest Court of that State.

In the case of the *People v. Brenham*, 3 Cal. 477, two of the Judges express opinions exactly upon the point involved in this case.

In that case, the Statute Charter of San Francisco provided that the mayor, etc., should be "annually elected," etc.

Justice Murray says the term annually, it is conceded, means not a *measure* of time, but a succession of calendar years. So says Justice Lyons; and also shows that a legislative interposition, such as we contend for, has been given to the word "annually" in the Constitution of California, in changing the day of election required by the Constitution to be held "annually." The reasons there assigned for the conclusions of those two Judges, as to how the word "annually" should be construed upon principle and policy, seem to us sound, and worthy of adoption by the Court in the case in hand.

It would be rather anomalous if the Courts of California should

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pursue the line of these opinions in determining the same question before this Court, whilst this Court departed from it, thus arriving at exactly opposite conclusions upon the same statute. And there can be no reason for supposing that the doctrine of these opinions will be abandoned in that State. There can be no such policy discovered upon any principle, it seems to us, as to forbid the exercise of the power which we seek to justify on the part of the Board of Trustees.

The rule which would overthrow our position on this point would, it seems to us, cripple legislation, and might prove most pernicious to public and private interests.

We think the power existed to make the amendment in question, and no abuse of that power is shown.

Mandamus is the proper remedy, even though respondent is in the office or station claimed by the relator. (*Rex v. Barker*, 3 Burrows, 1265a; *Dew v. Judges of Sweet Springs*, 3 Henning & Mumford, 1; 20 Pick. 495.)

The case of *The People v. Steele*, 2 Bar. 416-20, we ask special attention to, as there are found many authorities in point, and the case itself is equally so. Also, *Kimball v. Lamprey*, 19 N. H. 215, seems in point. (Practice Act, Sec. 414.)

We claim that this is the only remedy in our case. The case of *The People v. Olds* we contend is not supported by either reason or the statute, so far as it enunciates a different doctrine from that for which we contend, namely: that the relative rights of the contending parties to the office or place may be determined in the proceedings for mandamus.

Upon the first calling of this case for argument, but subsequent to the time when respondent had asked and obtained time within which to answer, *Will Campbell, Williams & Bizler* and *Aldrich & DeLong*, as counsel for respondent, moved to quash the writ on the following grounds:

First.—Because said writ is not issued in the name, or by the authority of the State of Nevada, or by any Court of said State, nor can a right of office be tried by mandamus.

Second.—Because said writ is made returnable in less than ten days from the time of issuing the same, or the service thereof.

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Third.—Because said writ does not state generally or otherwise the allegations against the said McCullough.

Subsequently, but before the amended or supplemental answer was pleaded, *Aldrich & Bizler* filed the following points on the merits :

When a person is in the office, the writ of mandamus will not lie to oust him and admit the relator. The proper remedy is by information in the nature of *quo warranto*. (*People ex rel. Arcularius et al. v. Mayor, etc., of New York*, 3 Johns. Cases, 79 ; *Fish v. Weatherwax*, 2 Johns. Cases, 217-10, Sec. 12 ; *People v. Scrugham*, 20 Barb. 302 ; *Moses on Mandamus*, 150 ; *People v. Olds*, 3 Cal. 167.)

After the new pleadings setting up the facts which had occurred since the last hearing were before the Court, the case was reargued orally, and *Will Campbell, Esq* , for respondent, made the following points :

The general incorporation law of California, which stands in lieu of a charter and the by-laws of the corporation, having made the election of trustees annual and fixed the day of the week and month when each annual election should take place, the stockholders were bound to take notice of the proper time of election, and such election would be good, even if no proper notice of the election was given. (*Angell & Ames on Corporations*, Sec. 418.)

The change of the day of election by the trustees is contrary to the charter, *i. e.*, the law under which the corporation derives its being, and must be disregarded. (*Angell & Ames on Corporations*, Sec. 345.)

The by-law is unreasonable in this, that it extends the term of office of the very men, and those alone, who voted for it ; deprives the stockholders of the right to elect, and is manifestly detrimental to the interests of the corporation, as shown by the votes of those interested on the day of election. If the trustees can extend the time of election for three months, they can extend from month to month, *in perpetuo*. (*Vide Angell & Ames on Corp. Sec. 347.*)

The word "annual" must be received in its usual acceptation. (*Vide Webster's Dict. Tit. "Annual."*) In the laws of the United States the same word is used, "annual income tax ;" in United

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States Bonds, "interest payable *semi-annually*." There are no two meanings to the word, and after diligent search I can find no judicial opinion construing it otherwise than Webster.

The certificates of incorporation were filed on the eleventh day of April, 1865. The by-laws then adopted fixed the election for the second Thursday of July, 1865: from that day the year commenced to run.

The trustees mentioned in certificate of incorporation could by law only hold office for three months, then the election in compliance with law became annual.

The trustees having fixed the day of election, any change is contrary to Sec. 5 of the Act of California, which is the charter of the incorporation. The day once being fixed by the trustees, the statute regulates the time of all future elections, to wit: *annually*.

The burthen of proof is on the relator to show that the action of the Board of Trustees in depriving the stockholders of the right of election on the eleventh day of July was for a good purpose, or for the interests of the stockholders, the *cestui que trust*; and no showing being made, and the stockholders deprived of a *right*, it will be presumed their action was unreasonable, vexatious, unequal, and detrimental to the interests of the corporation.

Opinion by LEWIS, J., BEATTY, C. J., concurring; and JOHNSON, J., concurring in judgment.

This is an application by the relator, Curtis, for a writ of mandamus to compel the defendant, McCullough, to deliver to him all the books and papers belonging to the office of Superintendent of the Overman Silver Mining Company, and to admit him to the enjoyment of all the rights incident to that position. Upon the first showing, we came to the conclusion that the peremptory writ should issue; but the showing made upon the supplemental answer, by which it was made to appear that the defendant, after the filing of his first answer, had been legally and duly appointed to the position claimed by the relator, we are compelled to refuse the writ.

Such being the case, Curtis, the relator, is justly entitled to the costs of this proceeding incurred up to the time of the filing of the

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supplemental answer. It therefore becomes necessary to give our views of the case as it stood when first submitted, which we will proceed to do, and then dispose of the questions raised on the supplemental answer.

By the affidavit upon which this application is based, it appears that the Overman Silver Mining Company is a corporation organized under the laws of the State of California, A.D. 1866, for the purpose of carrying on the business of mining in the county of Storey, in the State of Nevada; that the mine of the corporation is located in that county, and that it is now engaged in working and developing it. After alleging the election of a Board of Trustees in accordance with the Articles of Incorporation, it is further alleged that the by-laws of the corporation required and made it the duty of the Trustees to elect a Superintendent of the mine, whose duty it should be to take charge of the company's business in this State, and that such Superintendent should hold his office or position during the pleasure of the Board of Trustees; that on the twenty-fourth day of May, A.D. 1867, the defendant, McCullough, was elected Superintendent, to hold and enjoy that office during the pleasure of the Board of Trustees; that immediately after his election he entered upon his duties, and received from his predecessor and took charge of all the books and papers belonging to his office; and that from that time to the present he has discharged the duties and retained possession of all the books and papers belonging to the office.

It is then stated that a meeting of the Board of Trustees was held on the nineteenth day of June, A.D. 1867, and that at such meeting the defendant McCullough was removed from the superintendency of the mine by the Board, and that one John Lambert was appointed in his stead. That on the twenty-first day of June, two days after such removal, another "meeting of said Board of Trustees was held at the office of the company, at the city of San Francisco, upon a legal call therefor; that at such meeting all of the Trustees were present, and that at such meeting another resolution was legally passed and adopted by said Board of Trustees removing said John Lambert from the said office of Superintendent and appointing the relator as his successor, and directing the said

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John Lambert and the defendant McCullough to deliver to the relator possession of the mine of said company, and all the property and books in his or their possession belonging to said company.”

* * * * That after Lambert and the defendant McCullough had been notified of the action of the Board of Trustees, the relator personally demanded of them “possession of the works and mine of said company, and requested of each of them to be allowed to enter upon the discharge of his duty as such Superintendent, and at the same time demanded of said McCullough and Lambert possession of the books and papers pertaining to said office; that the said Lambert thereupon informed the relator that he was not in possession of the books or papers of said company pertaining to said office, nor of the works or mine of said company, and that he did not pretend to be the Superintendent thereof; but that the defendant McCullough unlawfully and wrongfully refused, and still unlawfully and wrongfully refuses to deliver said books and papers to the relator, or to transfer to him the control of said mine and works, or to allow relator to enter upon the discharge of the duties of his said office to which he has been appointed. Relator further says that he is legally entitled to the possession of said books and papers, and to perform the duties of said office.” We have deemed it necessary to a clear understanding of the case, to set out these statements of the affidavit in *hæc verba*. Upon this affidavit an alternative writ of mandamus was issued, commanding the defendant to deliver the books and papers pertaining to the office of Superintendent of the Overman Mine to the relator, and to allow him to enter upon the duties of that position, or to show cause on the twenty-eighth day of June, why he had not done so. Two days after the issuance of this writ the defendant appeared by counsel, and applied to this Court for further time to prepare his answer and make his showing. The affidavit upon which that application was based was made by McCullough’s attorneys, who, after stating that they are counsel for the defendant, say: “That it is the intention and object of the defendant to appear in this action and show to this Court by the records of the proceedings of the Board of Trustees of the Overman Silver Mining Company, that the removal or pretended removal of the defendant from the superintendency of

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the said mine was and is void; and that said McCullough is now and has continued to be lawfully such officer, and as such is entitled to hold, occupy and enjoy said office, and to continue in the possession of the books and papers of said company; that the defendant's answer cannot be properly prepared until certain documents can be obtained from San Francisco; that deponents believe and aver that it will be impossible to properly prepare and present their answer in this case in less time than one week from this date." Upon this showing and application of counsel for defendant, this Court extended the time for the showing and filing the answer, in accordance with the wishes of counsel.

Upon the day thus fixed, at the request of counsel for defendant, for filing the answer and showing cause, a motion to quash the writ was made upon the following grounds:

1. Because the writ did not issue in the name of, or by the authority of the State of Nevada, or by any Court of said State.
2. Because the writ was made returnable in less than ten days from the time of issuing it or service upon the defendant.
3. Because the writ did not state generally or otherwise the allegations against the defendant.

We will dispose of these points in the order in which they are presented. And, first, it is admitted the writ is defective, as claimed by counsel. The Constitution declares that "the style of all process shall be 'The State of Nevada.'" The State is the sovereign by whose power alone the citizen can be compelled to appear in its Courts to answer to an action brought against him. There is no other authority by which those tribunals can obtain jurisdiction of the citizen, except by his own consent or voluntary submission to their jurisdiction. However, after such jurisdiction is once obtained, whether by legal process or by the voluntary acknowledgment of the authority of the Court to determine his rights, the jurisdiction over the person is complete for all the purposes of that proceeding, provided the tribunal has jurisdiction of the subject matter. In this matter, we are satisfied that the defendant McCullough would have lost no rights by a refusal to obey the writ because of the informality suggested. Had the Court, upon his refusal to appear, rendered judgment against him, or ordered the issuance of a per-

emptory mandamus, he could at any time have had the proceedings set aside upon motion for that purpose. Or he could have appeared specially for the purpose of setting aside the defective writ, without acknowledging the jurisdiction of the Court; for by appearing to object to the jurisdiction over him, it could not be said that he thereby acknowledged such jurisdiction. But instead of pursuing one of these methods, the defendant chose to appear in the proceeding, not for the purpose of objecting to the jurisdiction of the Court, but to ask for its affirmative action in his favor, after a full acknowledgment of its jurisdiction over him. As may be seen by the affidavit of his counsel which has been referred to, it is stated that the answer could not be prepared in the limited time given by the Court, and they ask that the time for answering and showing cause why a peremptory writ should not issue be postponed for a week beyond the time fixed in the writ. They say that it was their intention to show that the removal of the defendant from the superintendency of the Overman Mine, and the appointment of the relator, were unauthorized acts and void, and that the defendant is the lawful Superintendent and entitled to the enjoyment of that office. The Court was led to believe by that affidavit that, if the required postponement was granted, these facts would be shown upon the hearing. Upon that understanding the postponement or continuance was granted. However, instead of such showing, counsel appear and claim that the Court had no jurisdiction over the defendant, and ask that the writ be quashed; but such a motion seems rather out of place, following as it did the affidavit for continuance, and the action of the Court upon it. That affidavit, it seems to us, gave the Court as complete jurisdiction of the defendant as an answer to the merits would have done. An objection to the form of process cannot be taken after pleading to the merits of the action in which it is issued, simply because filing the answer is an acknowledgment of the jurisdiction of the Court, and when that is done the process to all intents and purposes becomes *functus officio*.

It would seem that no answer could more completely acknowledge the jurisdiction of the Court than this affidavit filed by counsel for defendant in this proceeding. By asking an extension of the time to answer, the authority of the Court to require an answer is fully

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recognized. Whether there can be such an appearance on the part of a defendant as to entitle him to notice of subsequent proceedings in the action, in any way except by answer, demurrer, or written notice of appearance served on the plaintiff, is not necessary to determine at present. Section 466 of the Practice Act seems to limit such an appearance to those three methods.

But it is claimed by counsel that there can be no appearance, except by one of the three methods mentioned in that section. We think otherwise. Although it declares that "a defendant shall be deemed to appear in an action when he demurs, answers, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him," it was evidently not the intention of the Legislature to make those the only means by which a defendant could appear, but simply that the filing and service of an answer, demurrer, or notice of appearance, should be such an appearance as would entitle the defendant to notice of all subsequent proceedings in the cause.

The second clause of the section referred to declares that "after appearance a defendant or his attorney shall be entitled to notice of all subsequent proceedings of which notice is required to be given." This right of notice of subsequent proceedings being given to the defendant in this clause of the section after appearance, the appearance referred to in the first sentence may clearly be taken to mean such appearance as would entitle the defendant to the notice mentioned in the second sentence of the section, and that it was not the intention to specify all and the only methods by which an appearance could be effected.

This very case shows the impolicy, we might almost say the absurdity, of any other construction. Here is the defendant in fact appearing in the action, acknowledging as clearly as it was possible for him to do that he was in Court under the writ, asking the Court for affirmative action in his favor, himself fixing the day for the showing of cause why the peremptory writ should not issue; and yet upon that day objecting to the regularity of the writ, and denying that the Court had jurisdiction over him because of some informality in the process. We cannot believe that the Legislature intended to say that a defendant could not appear in an action ex-

cept by filing an answer, demurrer, or giving written notice to the plaintiff. He certainly can in fact appear. We cannot, therefore, sanction the doctrine that he cannot appear so as to give the Court jurisdiction of his person in any way except as specified in the section above referred to. Our opinion of the construction to be placed upon this section is strengthened by a reference to the New York code of 1848. It is observable that Title XV of our Practice Act was taken from and very nearly conforms to Chapter XI of the code. The section under consideration is contained in Title XV, and although not in the same language, it was evidently intended to make it conform substantially to Sec. 414 of the code. That section ends as follows:

“Where a defendant shall not have demurred or answered, service of notice or papers in the ordinary proceedings in an action need not be made upon him, unless he be imprisoned for want of bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.” The verbiage of Sec. 466 of our Act is somewhat different; but it is quite clear that nothing more was intended than that provided by Sec. 414 of the code. We are aware that the dictum in *Steinbach v. Leese*, 27 Cal. 287, is against our construction; but a rule so manifestly against the universal practice of all Courts should not be adopted, except upon the most unequivocal language of the statute.

To the second point made on the motion to quash the writ, the answer is: If the writ could not be made returnable in less than ten days, the defendant also waived the right to insist upon that right by consenting to appear in less time than ten days. He appeared by his counsel, asked that the return day in the writ be postponed for one week, at which time the Court was given to understand the defendant would be prepared to show cause why the peremptory writ should not issue. He should not be permitted, therefore, to take advantage of the fact that the writ was made returnable in less than ten days, when to all intents and purposes he consented to a hearing, or to make his showing in less time than that.

A general appearance waives all irregularity in the writ. (*Bowles v. Stoddard*, 7 John. 207.) Even where the process is void, if the defendant appear he is regularly in Court; (*Pixley v.*

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Winchell, 7 Cow. 366) and Sec. 32 of the Practice Act declares that "a voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him." Though the writ could not perhaps be regularly made returnable in less than ten days, yet as counsel appeared without raising that objection, and consented to show cause on a day fixed, the objection to the writ came too late.

And indeed, Sec. 425 of the Practice Act seems expressly to authorize the Court to make the writ returnable at any time. The third ground of objection to the writ is also untenable. The affidavit itself is by law required to be served with the writ; and as it is the affidavit and not the writ which under our practice is answered, it would seem utterly useless and unnecessary to repeat or set out its allegations in the process. *Lex neminem cogit ad vana seu inutilia peragenda*. But whether it be necessary or not is a matter of no consequence, and unnecessary to be determined in this case, as the general appearance of the defendant was a waiver of all such defects.

Having thus disposed of the question raised on the motion to quash, we will next consider the several questions raised by the demurrer.

First.—That this Court is strictly a Court of appellate jurisdiction, and cannot issue a writ of mandamus, except in aid of such jurisdiction.

It cannot be easily understood how there can be a difference of opinion upon this point. The language of the Constitution defining the jurisdiction and powers of this Court is very clear and explicit. It declares that "the Supreme Court shall have appellate jurisdiction in all cases in equity; also, all cases at law in which is involved the title, or right of possession of real estate or mining claims, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred dollars; also in all other civil cases not included in the general subdivision of law and equity, and also on questions of law alone in all criminal cases in which the offense charged amounts to felony. The Court shall also have power to issue writs of mandamus, certiorari, prohibition,

quo warranto, and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by, or on behalf of, any person held in actual custody, and may make such writs returnable before himself, or the Supreme Court, or before any District Court in the State, or before any Judge of said Court." (*Vide* Constitution, Art. VI, Sec. 4.) Here the power to issue certain writs named, including mandamus and *quo warranto*, is expressly given, and then follows a grant of power, which was unnecessary, because the Court would possess that power without express grant—that is, to "issue all writs necessary or proper to the complete exercise of its appellate jurisdiction." If the writs expressly mentioned were only intended as auxiliary to the appellate jurisdiction, it was certainly unnecessary to mention them, for the clause authorizing the Court to issue *all* writs necessary or proper to a complete exercise of its appellate jurisdiction most clearly includes all writs which could possibly be used as auxiliary to such jurisdiction. Without, therefore, convicting the members of the Constitutional Convention of gross tautology, it could not be held that the writs mentioned in the above section were intended to be issued only in aid of its appellate jurisdiction.

But there is a complete and conclusive answer to the position taken by counsel for defendant, independent of the grammatical construction of the language employed, viz: in the same sentence in which the power to issue mandamus is given, the Court is also authorized to issue the writ of *quo warranto*. We are unable to see how that writ could be used to aid the appellate jurisdiction of the Court. It is always the foundation of an original proceeding, discharging in fact the same functions as a summons in an ordinary action. Hence, it would seem as impossible to use *quo warranto* in aid of appellate jurisdiction as a summons itself.

The fact that the power to issue that writ is given in connection with the other writs mentioned would seem to be conclusive in favor of the original jurisdiction of the Court. Such has been the holding in California upon language identical with that employed in the Constitution of this State, with the exception that the power to issue

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the writ of *quo warranto* is not given to the Supreme Court of that State. (*Perry v. Ames*, 26 Cal. 372.)

We therefore conclude, not only from the language of the Constitution itself, but from the decisions in California upon the same question and upon similar language, that the power of this Court to issue the writs mentioned is not confined to cases where it may be necessary to aid its appellate jurisdiction, but that it may issue them as the foundation of an original proceeding.

Again, the jurisdiction of the Court is questioned because "the Overman Silver Mining Company is a foreign corporation, organized and existing in the State of California, and subject to its laws, and because the appointment of both the applicant Curtis and McCullough were made in the State of California, and the question of the right of either to exercise the powers of Superintendent is cognizable in the Courts of California."

It is very true, as argued by counsel, that a corporation can have no legal existence outside of the territorial limits of the sovereignty creating it. It is the creature of statute. Where the statute ceases to operate, the corporation ceases to exist. It must therefore dwell within the jurisdiction of the power which created it. It does not, however, follow that its existence cannot be recognized elsewhere, or that it may not transact business or enter into contracts in other States. In the case of the *Bank of Augusta v. Earl*, 13 Peters, 519, this question was elaborately discussed and settled; the learned Chief Justice, in delivering the opinion of the Court, using the following language:

"It (a corporation) is indeed a mere artificial being, invisible and intangible. Yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of the Court. It was so held in the case of the *United States v. Amedy*, 11 Wheaton, 412, and in *Beaston v. The Farmers' Bank of Delaware*, 12 Peters, 135. Now natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and when they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a

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contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by the laws of the place? The corporation must no doubt show that the law of its creation gave it authority to make such contracts through such agents; yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the laws of that place to exercise there the powers with which it is endowed."

True, the laws of the State creating a corporation cannot, *ex proprio vigore*, authorize it to contract or transact business in another State. Such rights depend entirely upon the will of the sovereignty where the transaction takes place or the contract is entered into. It is only by what is called the comity of nations that even the existence of the corporation at the place of its creation is recognized by the Courts of other States or nations. By it alone are they permitted to enter into contracts in foreign countries or other States, and to sue in their Courts. But this comity is uniformly observed amongst all Christian nations, and between the several States of the Federal Union.

Chief Justice Taney, in the case already referred to, says upon this point: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples, and Courts of Justice have always expounded and executed them according to the law of the place in which they were made, provided the law was not repugnant to the laws or policy of their own country.

"The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignty to which they belong, that Courts of justice have

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continually acted upon it as a part of the voluntary law of nations."

That the Courts of one State will recognize the existence and enforce the contracts of a foreign corporation, executed without its limits, is fully settled in that case; and the rule was afterwards affirmed by the same Court in the case of *Bunyan v. Coster's Lessees*, 14 Pet. 122. If the Court of the State wherein the contract was executed by a foreign corporation will enforce such contract, and receive proof of the existence of such corporation, it must, *ex necessitate*, have the power to inquire into and determine whether the corporation acted within the scope of the powers conferred upon it by the law of its creation in entering into such contract. Whether the corporation has the *power* to transact business or enter into contracts beyond the limits of the sovereignty creating it, depends upon the law under which it is organized; whether it *may* do so depends upon the will of the State where it attempts to carry on such business. Such Court may, therefore, in enforcing any contract executed by a foreign corporation, or determining any rights growing out of the action of such corporation, look to the law or charter creating it, and the by-laws adopted by it, for the purpose of ascertaining whether it acted within the legitimate scope of its authority in executing the contract or enforcing a right. So it was held by the Supreme Court in both the cases above referred to.

It is not claimed, and indeed we are satisfied it could not be successfully maintained, that the State of Nevada has ever expressed an unwillingness to allow foreign corporations to carry on the business of mining within her territory; but, on the contrary, her entire legislation on the subject of corporations indicates a purpose to permit it. It is a part of the history of the Territory, and also of the State, that a majority of the mines within its limits have been and now are worked by corporations organized in other States. As under such circumstances the Legislature has shown no disposition to prohibit it, the legal presumption is that the State recognizes their existence under the laws of the State where they are created, and concedes to them the privilege of conducting the business for which they were created within its limits. Indeed, in the absence of any positive law, the presumption in such cases always is that the laws of a foreign nation are tacitly adopted.

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"In the silence of any positive rule," says Mr. Justice Story, "affirming, or denying, or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own Government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the Courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided." And this language was quoted with approbation by the Supreme Court of the United States in the case of *The Bank of Augusta v. Earl*, *supra*.

By applying these general principles to the case at bar, we arrive at the conclusion that the Courts of this State must recognize the existence of foreign corporations at the place of their creation ; that so far as it is possible to ascertain, it is not considered to be in contravention of the policy or interest of this State to prevent foreign corporations from carrying on the business of mining within its territorial limits ; that the Courts of this State ought to enforce all valid contracts made by such corporations within the State, and enforce and protect all individual rights acquired from them to the utmost extent of their jurisdiction.

But it is claimed by counsel for defendant, "that the officers of a foreign corporation cannot be recognized as officers beyond the limits of the sovereignty which created the corporation ; that their official character ceases the moment they pass such limits, and therefore there is no office into which the relator can be admitted."

In *McQueen v. The Middleton Manufactory Co.*, 16 Johnson, 7 ; *Brobst v. Bank of Penn.*, 5 Watts & S. 379, it was held that the officers of a corporation could not be recognized in their official character out of the jurisdiction of the State creating the corporation ; but in those very cases the distinction is made between an officer of a foreign corporation and its agents. It is admitted by all the authorities that such corporations may be represented by, and may transact business in other States through their agents, and that such agents will be recognized as the representatives of the corporation.

Though technically a foreign corporation and its officers cannot exist as such beyond the limits of the power creating them, yet it

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is conceded that the authority and power of their agents will be respected as the agents of a natural person residing in another State would be, the corporation being an artificial person, with the same right to be represented by its agents as a natural person. Hence, there may be no office in its technical sense, to the enjoyment of which the relator has a right, yet here is the right to represent the corporation, to act for it as its agent, and the position as agent, which he claims; the enjoyment of which he alleges the defendant is depriving him of. Now it will be observed that the remedy by mandamus under the statute of this State is not confined to cases where a person is deprived of the enjoyment of an office, but it may be issued "to compel the admission of a party to the use and enjoyment of a *right* or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or *person*."

The remedy by this writ, under the statute of this State, seems much more extensive than it was at common law, and this case seems clearly to be embraced within its provisions. If the relator be the agent of the corporation, and the defendant is depriving him of the enjoyment of the right to act for his principal, that would seem to be precluding him from the enjoyment of a right to which he is entitled. The Court has complete jurisdiction of the parties, and the power to determine which of them has the right to the position claimed by the relator. Why then may it not afford the relator the relief to which he shows himself entitled? Admitted that the Court has no jurisdiction of the corporation; but it has of the relator, who claims the enjoyment of certain rights acquired from the corporation. No judgment can be rendered here which will bind the corporation; this proceeding is simply between individuals over whom the Courts of this State have jurisdiction, but who claim their rights from a foreign corporation. The source from whence they derive their rights is a matter of no consequence, if the Court has jurisdiction of the individuals.

But has the relator any other "plain, speedy" and adequate remedy "in the ordinary course of law?" If he has, it is admitted he is not entitled to the remedy by mandamus. We know of no other speedy and adequate means by which he may be placed

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in the enjoyment of the right which he claims. The recovery of the books and papers which pass with the agency would not necessarily place the relator in the enjoyment of the right which he claims.

It is necessary that the employés of the corporation should know who is the legitimate representative of that body. The recovery of the books and papers would not establish that fact.

The relator, if he be the duly authorized agent, has the right to discharge the duties and receive the emoluments connected with that position, but the recovery of the books and papers would not afford him the relief to which he is entitled. It is claimed that an information in the nature of *quo warranto* is the relator's proper remedy—that the title to an office cannot be tried by mandamus. But it is also urged by the counsel who makes this point, that the Overman Silver Mining Company, being a foreign corporation, can have no officer within the State of Nevada; that neither the relator nor defendant can be recognized within this State as an officer of a foreign corporation, but only as its agent. However this may be, we are satisfied the authorities will support the proposition that mandamus is the proper remedy to compel the admission of a person to an office or position to which he is entitled, when it is not filled by another claiming under color of right. In such case, if the position be not filled or claimed by another, there would be no title to try, hence *quo warranto* would be unnecessary.

In the case of *Strong, petitioner, etc.*, 20 Pickering, the Court said: "Mandamus is the proper process for restoring a person to an office from which he has been unjustly removed. * * * So also it lies to admit any one to an office, a service or a franchise, from which he is unlawfully excluded."

In *Dew v. The Judges of Sweet Springs*, 3 Heming & Mumford, 1, the Supreme Court of Virginia held, upon thorough argument, that mandamus was the proper remedy when the title of the applicant is clear. Justice Roane concludes his consideration of that question in the following language:

"I take it, therefore, that even in England, and in relation to cases within the statute of Anne, the possession of the office by another is no impediment to a mandamus where the title of the incumbent is clearly void, and where no utility can result from a trial

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on a *quo warranto* information, and *a fortiori* in this country, where the proceeding by information is not guaranteed to every citizen, but must be pursued, if at all, by permission of the Attorney General under the common law." So it was held in *Kimball v. Lamprey*, 19 N. H. 215; *The People ex rel. Benjamin Griffin v. William Steele*, 2 Barbour, 397; *Rex v. Barker et al.*, 3 Burr. 1265. In this last case Lord Mansfield said: "Where there is a right to execute an office, perform a service or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession or dispossessed of such right, and has no other specific legal remedy, this Court ought to assist by a mandamus, upon reasons of justice."

We do not hold that the title to an office may be tried by mandamus; because, with our view of the pleadings in this case, no such question can arise; but simply that mandamus is the proper remedy to compel the admission of a person to a private right or office, from the enjoyment of which he is excluded, and where there is no other person claiming it under color of right. In this case there is no such claim. The defendant's answer raises no issues of fact whatever, and upon it we are clearly of opinion that the relator was entitled to the peremptory writ. The affidavit alleges that a meeting of the Board of Trustees of the Overman Company was held on a legal call therefor on the twenty-first of June; that at that meeting the defendant was removed from the position of Superintendent and the relator elected in his place. This statement or allegation is met in the answer by a denial that the call for a meeting was *legal*. It is denied that the resolution removing defendant and appointing the relator was *legally* adopted; that the Board of Trustees which passed the resolution was a *legal* board; and the reason given for not delivering the books and papers, and for not allowing the relator to enter upon the discharge of his duties as Superintendent of the Overman mine, is because the relator was *illegally* appointed. And again, the defendant denies that the relator is *legally* entitled to the possession of the books and papers, or to have the control of the works and mine, or to perform the duties of said office. No facts whatever are stated in the answer showing why the proceedings of the Board of Trustees which met on the twenty-first of

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June were *illegal*. The simple statement of the defendant is presented, that the call for the meeting itself, the resolution, and all the proceedings of the Board were *illegal*. But that is not sufficient. The grounds upon which it is claimed the proceedings were illegal should have been stated in the answer, so as to enable the Court to judge of their legality, and to apprise the relator of the exact defense to be made. By simply denying the legality of the facts alleged in the affidavit, the facts themselves are admitted. To deny that the resolution was legally adopted, is an admission that it was in fact adopted. Hence it is necessary to state the facts upon which the illegality is claimed. The same rules to a great extent which govern pleadings in ordinary actions are applicable to the return on mandamus. The return must be direct and positive, and not argumentative. The facts, and not mere conclusions of law, must be stated. (Vide Bacon's Abridgment, "Mandamus.")

And Section 418 of the Practice Act provides that the answer shall be made in the same manner as an answer to a complaint in a civil action. We conclude, therefore, that upon this answer being filed the relator was entitled to the peremptory mandamus, and that no issue was raised upon the right to the enjoyment of the position claimed by the relator. Having shown himself entitled to the writ at the time he applied for it, and at the time the defendant filed his answer, he is entitled to his costs incurred up to that time, notwithstanding the supplemental answer afterwards filed sets up a fact which, being established, shows that the relator has lost his right to the writ since he commenced this proceeding, it being shown that the defendant since that time has been legally elected to the position of Superintendent of the mine.

By the supplemental answer, which was filed by consent of parties, it is alleged that since the original answer and hearing, the Trustees of the Overman Mining Company, at a meeting held on the eleventh day of July, elected the defendant to the position which is claimed by the relator. This fact is admitted by counsel for the relator; but it is claimed that the Trustees who elected him were not the legal Board, and had no power to elect the defendant. The facts upon which this claim is based are these: It appears

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that the law under which the corporation in question was organized provides that the Trustees shall be "*annually* elected by the stockholders of the company, at such time and place, and upon such notice, and in such mode as shall be directed by the by-laws of the company." By the by-laws of the company, the second Thursday of July of each year was fixed as the time for the annual meeting of the stockholders. It is also provided that the by-laws may be amended at any meeting of the Trustees. At a meeting of the Board, held on the nineteenth day of June, A.D. 1867, the Trustees amended Article 14 of the by-laws, as to the time of holding the annual meeting, by fixing it on the second Thursday of October. This amendment was made only a few days before the time fixed by the laws for the regular annual meeting of the company. It is admitted by counsel for relator that if the Trustees exceeded their power in postponing the annual meeting of the stockholders from July to October, the defendant is entitled to the position which is claimed by the relator, because regularly appointed by the new Board of Trustees which was elected at the meeting of the stockholders on the second Thursday of July. It is, however, claimed that the old Board had a right to amend the by-laws so as to postpone the annual meeting to October, and that having done so, the meeting and election which took place on the eleventh of July was unauthorized and illegal. The only question, therefore, presented for consideration upon the supplemental answer is whether the amendment of Article 14 by the old Board of Trustees was legal. In our opinion it was not. The law requires an *annual* election of Trustees. Annual, from the Latin *annus*, usually means yearly, or every twelve months.

Wherever used in contracts it is construed to mean every twelve calendar months. Annual interest is interest payable every twelve months. Annual rent is construed in the same way. But the expression "*annually* elected," as used in the Corporation Law of California, would not perhaps admit of this very strict construction.

In requiring an "*annual*" election of Trustees, the evident purpose of the Legislature was to limit the term of office to twelve months, or as near to that period as practicable; that a uniform rule should be adopted, so that each successive Board of Trustees

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should hold office for one year. It would perhaps be impossible to fix a period which would always recur within twelve months exactly, and upon which an election might be held, because the calendar day may be the Christian Sabbath, and a given day in the week in any month would not always agree precisely with the solar year.

But if a uniform rule be adopted which, when followed, would give each successive set of officers twelve months' term of office, as near as practicable, that would doubtless meet the requirements of the statute. As for example, if a movable holiday be fixed on, as the day of election, though it might not always recur within three hundred and sixty-five days, yet that would be considered an annual election and regular. (*People v. Rankin*, 9 John, 147.) However, to extend the term of office to fifteen months would not certainly meet the spirit of the statute, and would seem to be irregular.

Again, notwithstanding the Trustees are authorized to amend the by-laws, yet it must be conceded that they have not the right to so amend them as to deprive the stockholders of those fundamental powers by which they control the officers of the corporation.

That the Trustees should have the power to amend the by-laws, is almost a matter of necessity; but as the Trustees are simply the representatives of the corporators, they have no right to do anything in their official capacity which is prejudicial to the interest of their constituents, or to interfere with the powers which the stockholders have reserved to themselves.

An act done against the expressed wish of the stockholders would certainly be presumed to be against the interest of the corporation.

In the by-laws of the Overman Company, adopted by the stockholders, a day is fixed when they could meet for the purpose of electing officers of the corporation.

The power of electing such officers is vested in the stockholders by the law creating the corporation. It is a power which the stockholders themselves could not transfer to the Trustees; which can be exercised only by them. But to amend the by-laws so as to deprive the stockholders of that control or supervision over the affairs of the corporation which the right to elect their officers annually gives them, or to interfere with that right in any way,

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would certainly seem to be incompatible with the relations existing between the Trustees and stockholders. It is like an agent taking advantage of his position to deprive his principal of the power of removing him. As the power of selecting the officers of the corporation is vested exclusively in the stockholders, and they could not, even if they chose, transfer that power to the Trustees, how can it be said the Trustees acted within the legitimate scope of their authority when they assumed the power of continuing themselves in office three months beyond the term fixed by the stockholders? Is not that substantially arrogating a power which the stockholders alone possessed? It was doing, in an indirect way, that which the law virtually denied them the power of doing directly.

The stockholders placed them in office to continue to the second Thursday in July: they, by virtue of their position, attempt to extend their term beyond the period thus fixed. The unqualified power of selecting their officers, and the power of fixing the time when they may hold meetings for that purpose, is absolutely necessary to a proper control of the corporate affairs: and as the stockholders alone have the power of electing the officers, the time, place and manner of doing it should be absolutely under their control. But if their own officers may postpone the time fixed for such election, they may maintain themselves in office beyond the time for which they are elected, and that too in defiance of the wishes of the corporation, and to its prejudice. By fixing a period when an election should take place, the stockholders prescribed the time during which they wished their Trustees to hold office and discharge the duties of their position; hence an attempt on the part of such officers to continue themselves in such office beyond the prescribed period, would seem to be an act in direct opposition to the will of the stockholders: virtually, a denial of their right to remove the Trustees and elect new officers on the day fixed.

We announce, as a general principle, that no elective officer should be allowed to do any act which will prevent the election of his successor at the time and in the manner fixed by law, or by the persons having the power or right of election; or to do any act

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which will continue him in office beyond the time for which he was elected.

Here the Trustees have, by amending the by-laws, attempted to extend the term of their office three months beyond the time for which they were elected, and indeed to deprive the stockholders of the power to elect their successors at the time and place fixed for that purpose: and this without any apparent necessity or cause for so doing.

Such an act will always be viewed with jealousy by the Courts; and in this case, we hold it utterly unauthorized and void. As it was so treated by the stockholders, and as a regular meeting was held on the eleventh day of July, as provided by the by-laws, a new Board of Trustees regularly elected, and the defendant appointed to the position claimed by the relator, the peremptory writ must be denied.

The relator to have his costs incurred up to the time the supplemental answer was filed.

Opinion by JOHNSON, J.

I concur with my associates in the judgment they have pronounced in the foregoing opinion, but dissent from their views as to some of the grounds on which they rest the judgment. These points of difference, according to my understanding, though not material in the determination of this particular case, yet do become important, when they serve as an established rule, governing similar proceedings in the future action of our Courts. Therefore, I shall hereafter present, in a separate opinion, my views on the material points wherein I disagree with the other members of the Court.

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ALEXANDER BEATTY, RESPONDENT, v. ADOLPHUS SYL-
VESTER, APPELLANT.

Where goods are pawned as security for a running account, it is not essential that the pawner should tender the amount of account before filing a bill to redeem.

If he proffers to account with the pawnee, and pay whatever is found due on such accounting, and that proffer is refused, he may bring his complaint for accounting and redemption at the same time; and if the pawnee has sold the goods, he may have a decree for the balance due him from the proceeds of sale.

The admission of hearsay evidence about a point which was immaterial and which could, by no possibility, have injured appellant, will not be ground for reversing a case.

When a party makes out a good *prima facie* case for a continuance on account of the absence of a material witness, the Court is not justified in refusing the continuance because it may imagine the possible existence of facts which, if shown, would have been sufficient in avoidance of the case made by the party moving.

When the Court below errs in refusing a continuance, and an exception is taken and made a part of the record by regular bill of exceptions, signed by the Judge, there is no imperative necessity for a motion for a new trial, to bring the point before this Court.

When county warrants are pledged to a merchant as security for a running account, and there is an agreement that the merchant may at any time sell the warrants at fifty cents on the dollar or take them himself at that price, he will not be allowed to hold them at that price unless he shows clearly, either that he notified the pawner of his intention to take them at the rate of fifty cents, or actually gave him credit at that price on his books.

If there was any fraudulent or unfair conduct on the part of the pawnee, he will not be allowed to hold the warrants at fifty cents on the dollar.

APPEALED from the District Court of the Seventh Judicial District, Hon. BENJAMIN CURLER, presiding.

Hubbard & Wells, for Appellant, made the following points:

First. The Court erred in overruling the demurrer of the defendant to the plaintiff's complaint.

Second. The Court erred in overruling defendant's motion for a continuance.

Third. The Court erred in permitting answers to be made to the several questions set out in the transcript as having been asked by counsel for plaintiff, objected to by counsel for defendant, and

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permission given by the Court to be answered. Also in the admission of the documentary evidence, offered and received in the case.

Fourth. The Court erred in overruling defendant's motion for a nonsuit.

Fifth. The Court erred in overruling defendant's motion, or request, to reduce its rulings or decisions to writing.

Sixth. The Court erred in entering such a judgment as it did in this cause, on such a verdict; the verdict being contrary to the law, and not supported by the evidence.

Thomas E. Haydon, for Respondent, made the following points:

This Court will not order a new trial in a case where the Court below erred in refusing a continuance, on account of the absence of a material witness, unless the party complaining of the error moves for a new trial in the Court below, and produces the affidavit of the absent witness showing what he would have proved if present, or accounts for his not producing such affidavit. (*Putah Creek Canal Co. v. Chapman*, 11 Cal. 162; *People v. DeLacy*, 28 Id. 590; *People v. Jocelyn*, 29 Id. 563; *Griffin v. Polhemus*, 20 Id. 181; *Crosby v. Snow*, 16 Maine, 121; *Graham & Waterman on New Trials*, Vol. III, 1,001; *Bright v. Wilson's Adm'r*; 7 B. Monroe, 124.)

The granting of continuances is always a matter of discretion with the Court below, not to be interfered with by an Appellate Court, except in extreme cases. (*Hill v. Bishop*, 2 Alabama, 320; *Hill v. Gayle*, 1 Alabama, 775.)

Opinion by BEATTY, C. J., LEWIS, J., concurring.

The plaintiff filed his complaint, stating in substance that he had pledged certain county warrants as security for an account he was contracting with defendant at the time of the pledge; that he had since offered to pay his account, and demanded the redelivery of the articles pledged, but defendant had refused to account or redeliver, etc.

The prayer is for an accounting with the defendant, and asking that upon such accounting, and upon the payment of the money due on the account, defendant should be compelled to surrender the

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pledged warrants, or if the warrants were collected or converted, then for a judgment for the value thereof. Defendant first demurred to the complaint; and on that being overruled, he answered.

The answer admits that the warrants were pledged as alleged in the complaint. But by way of defense, it is alleged that when the warrants were pledged there was a special agreement that the defendant might at any time sell them at their market value, and apply the proceeds on the debt for which they were pledged; or if he chose, he might at any time appropriate them to his own use, giving plaintiff credit for the value thereof at the time of appropriation.

Defendant further alleges, that at a time subsequent to the original pledge of the warrants, there was another and further agreement between the parties, that defendant might either sell the warrants for fifty cents on the dollar, and credit plaintiff with the amount realized, or he might himself take the warrants at fifty cents on the dollar, and credit plaintiff with the amount.

Defendant avers, that he did elect to take the warrants at fifty cents on the dollar, did credit plaintiff with the proceeds, and that after such credit had been given there was an accounting between the parties, and plaintiff fell in debt to him on such accounting; that the amount still due on said account over and above the proceeds of the warrants is eighty-five dollars.

The cause went to trial before a jury, who rendered a verdict in favor of plaintiff for \$342.28. The defendant appeals, and makes several points before this Court.

The first is, that the complaint does not state facts sufficient to constitute a cause of action. We see no defect in the complaint. The pledge was to secure a running account. It could not be expected that plaintiff would know the exact amount of his account. It was not necessary for him to tender anything. It was sufficient for him to demand the items of his account, and show himself willing to pay whatever was found due. The offer of redemption in his complaint is also sufficient. (See *Stupp v. Phelps*, 7 Dana, 296.) There is no defect in the complaint.

There is also an objection raised by defendant to certain evidence

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which was admitted by the Court below as to the payment of the warrants which were the subject of controversy in this case.

It seems that the County Treasurer paid one of these warrants, subsequent to the bringing of this suit, to one Sine, who presented it for payment.

The Court allowed the Treasurer to prove that Sine said he was collecting the money for defendant. This was certainly hearsay evidence, but this was immaterial. The defendant admits having received the warrants, and was answerable for their face after they were paid, whether paid to himself or another, unless he could prove a lawful conversion. So although this was mere hearsay, it did no harm. It was sufficient to prove that the Treasurer had paid the warrants described in the pleadings, without any proof as to who received the money.

There is, however, one serious error, which must reverse this case. The defendant made an affidavit for a continuance. That affidavit states with precision what he expects to prove by an absent witness. It shows due diligence in trying to procure the attendance of the witness; it shows clearly that the witness was detained from Court by sickness, rendering it impossible for him to travel from Belmont, his place of residence, to Ione, the county seat. In fact it shows all that need be shown to entitle a party to a continuance on account of an absent witness.

If this showing did not entitle the defendant to a continuance, we can hardly conceive of any showing that would be sufficient for such purpose. The only reason urged why the Court may have been right in refusing to grant the continuance is, that defendant fails to negative the proposition that he knew beforehand that witness would be sick; that if he did know witness had a disease which would confine him to his residence for a long time, he should have taken his deposition.

We think an affidavit for continuance need not negative every possible suggestion that might be made in avoidance of the facts set up in the affidavit. If it was true that the witness had some chronic disease which was likely to confine him at home for a long time, and defendant knew that fact, and he had time after issue joined, he should have taken his deposition. But there is nothing

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to show that witness had been confined for any length of time—nothing to show defendant knew anything about his being sick until the subpoena was served, a few days before the case was set for trial. The case had been at issue only a very short time. We think it is clear the Court did not exercise a sound discretion in refusing the continuance.

But it is urged that, admitting the Court did err in refusing the continuance, the defendant should not have relied alone on his bill of exceptions, showing the circumstances under which the continuance was refused, but should have moved for a new trial, and shown by the affidavit of absent witness what he would have proved on the trial if he had been present and sworn. No doubt there are many cases where the party complaining of being forced into trial might greatly strengthen his position before this Court by showing, on a notice for a new trial, by the affidavit of the absent witness himself, what he would have proved. But if there is a clear case for continuance made out, and the record shows the party asking for a continuance excepted to the ruling of the Court refusing to sustain his motion, there is no imperative necessity for a motion for a new trial. In this case, nothing could have been gained by such a motion, unless the appellant had gone to Belmont—a point many miles distant from the place of trial—to take the affidavit of a sick witness. Such expense, we think, was unnecessary.

The case must be reversed, and sent back for new trial.

In retrying this case, the following questions of fact should be settled: First, what is the amount of the debt due from plaintiff to defendant? Second, did the plaintiff agree with defendant, as alleged in the answer, that defendant might take the warrants at fifty cents on the dollar of their par value?

If such agreement was made, did defendant take the notes, give the plaintiff credit for half their par value, and also give the plaintiff notice of such appropriation?

When these questions are settled, whether before the Court, jury, or referee, the remainder of the case is plain enough. If there was no contract between the parties allowing defendant to appropriate the warrants to his own use, then he must account for the total amount paid by the County Treasurer.

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But if the defendant was by express contract allowed to take the scrip at fifty cents on the dollar, then he will only have to account for one-half the face of the warrants, and interest up to the time he gave the plaintiff credit for them.

The defendant should not be allowed to hold the warrants at half their face, unless upon clear and satisfactory evidence not only that there was a contract allowing him so to do, but that he did elect to hold the warrants, and did make that election apparent by crediting that amount on his books to plaintiff, or else giving personal notice to plaintiff that he had elected to take the warrants. A mere resolution in his own mind to take the warrants would not be sufficient. It must have been such an appropriation that the plaintiff could have availed himself of it. This is a chancery case, and there is no necessity for a jury in such case.

To allow the defendant to appropriate these warrants to his own use at only fifty cents on the dollar, and that when he must have known that in a very short time they would be paid dollar for dollar by the Treasurer, is so hard and unconscionable a transaction that it ought not to be sustained by the Chancellor, unless upon clear and satisfactory evidence that the plaintiff agreed to such arrangement, and that the defendant did not make any fraudulent or oppressive use of his position and power over the plaintiff.

GEORGE F. JONES *et al.*, APPELLANTS, v. H. F. THEALL,
RESPONDENT.

The Legislature of this State, when convened in special session, can only legislate on those subjects for which they were specially convened, and such others as may be called to their attention during the session, by the Governor.

The Secretary of State may transmit to the Legislature in extra session the bills vetoed by the Governor, after the expiration of the regular session, but unless the Governor call attention to these vetoed bills and require action thereon, the Legislature is powerless to act until the next regular session.

THIS was an original application for mandamus, to this Court. The facts are stated in the opinion of the Court.

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Williams & Bixler, for Relators.

Where the word "session" of the Legislature is used in the Constitution, it includes both general and special session, unless some qualifying words are used to confine it to one or the other.

If Sec. 35, Art. IV is not restrained by some other clause, the Secretary must return vetoed bills to the first session of the Legislature (general or special).

In our view, Sec. 9, Art. V, of the Constitution confines legislative action in special sessions to subjects to which the Governor calls attention, and to those subjects which the Constitution provides shall be acted on.

If it was intended to require the Secretary only to return vetoed bills to the next regular session, then, even if the Governor were to call the special attention of the Legislature to such a bill, and desire their action thereon, they could not act because the bill would not be in their possession, and they would have no means of getting it if the Secretary of State should choose to withhold it until the time arrived at which the Constitution would require him to return it.

Wm. Hoover, City Attorney, *Mesick & Seely*, and *W. F. Cole*, for Respondent. No brief on file.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

This is an application by the relator, for a mandamus to compel the Treasurer of Storey County, [Virginia City] to pay certain warrants held by him, and which he claims are payable out of the Redemption Fund of the County [City] Treasury.

The relator bases his right to this writ entirely upon an Act of the Legislature, entitled "An Act providing for the Payment of certain Indebtedness due certain parties from the City of Virginia," which was passed by the State Legislature at its third session, vetoed by the Governor, and at a special session subsequently held, again passed, notwithstanding the objections of the Executive. All the material facts recited in the affidavit are admitted in the answer, and the only question presented for determination by this Court is whether the Act above referred to ever became a law. It appears

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that after the adjournment of the regular session of the Legislature, and within the constitutional time, the Governor having some objections to the bill, filed it, together with his objections thereto, in the office of the Secretary of State, as required by Sec. 35, Art. IV, of the Constitution, which declares that "if any bill shall not be returned within five days after it shall have been presented to him, (the Governor) exclusive of the day on which he received it, the same shall be a law in like manner as if he had signed it, unless the Legislature, by its final adjournment, prevent such return; in which case it shall be a law, unless the Governor, within ten days next after the adjournment, (Sundays excepted) shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session in like manner as if it had been returned by the Governor; and if the same shall receive the vote of two-thirds of the members elected to each branch of the Legislature, upon a vote taken by yeas and nays, to be entered upon the journals of each House, it shall become a law." To the special session of the Legislature convened by the proclamation of the Governor a few days after the adjournment of the general session, the Secretary of State returned this bill, which was taken up and passed by a two-thirds' vote, and thus it is claimed become a law. Upon these facts, it is urged on behalf of the defendant that the Legislature, at its special session, had no power to act on the bill, it not having been called to its attention by the Governor, and therefore that it never became a law.

Such is also our opinion, and we think it most clearly sustained both by the letter and spirit of the Constitution. Whilst the scope within which the Legislature may act during its general session is almost unlimited, it is restricted at its special sessions to the consideration of such business as may be specially called to its attention. Section 9, Article V, of the Constitution prescribes the limits of its power at such sessions in the following language: "The Governor may on extraordinary occasions convene the Legislature by proclamation, and shall state to both Houses, when organized, the purpose for which they have been convened, *and the Legislature shall transact* no legislative business *except that for which they were specially convened*, or such other legislative business as the Governor may call to the attention of the Legislature while in session."

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There is certainly no ambiguity in this language; and unless we adopt the saying of Talleyrand—that words are given to conceal ideas—there can be no difficulty in ascertaining the object sought to be accomplished by this section of the Constitution. The powers of the Legislature at its special sessions are expressly and clearly limited to the transaction of the business for which it may be convened, or such other business as the Executive may call to its attention whilst it is in session. If the Legislature can break through this limit for one purpose, it may for all purposes, and enter upon general legislation. If it may take up a vetoed bill to which its attention is not directed by the Governor, it may frame and pass an entirely new bill upon a subject not referred to in any Executive message. It is either strictly limited to such special subjects as may be called to its attention, or it is not limited at all. There is no mean between these extremes which can be adopted without a clear departure from the letter of the Constitution. Let it be borne in mind that it is only upon extraordinary occasions that a special session is authorized to be called: such being the case, it is fair to presume that it was the intention to allow none but urgent business, and such as would admit of no delay, to be transacted at such a session; that ordinary legislative business should not be transacted at a session which can properly be convened only upon some extraordinary occasion, or when some great emergency makes it necessary, is so manifestly proper, and the transaction of such business would seem to be so manifestly *improper*, that we are confirmed in the opinion that it is the purpose of the Constitution to forbid consideration of any but such business as the Governor may deem necessary to be transacted at such sessions; but a reconsideration of all bills vetoed and filed by the Governor in the office of the Secretary of State after the adjournment of the general session, is not necessarily business of such urgent importance as to make a special session necessary, or such as to justify the attention of the Legislature if so convened. Such bills might possibly be of the most trivial character. At least, if it were deemed important to have them reconsidered, it is the province of the Executive to ask legislative action upon them. It is however said by counsel, that Sec. 35 of Article IV makes it the duty of the Secretary of State to transmit all

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vetoed bills filed with him after the adjournment of the regular session, to the "Legislature at its next session" (which, it is urged, means the next session, whether general or special); but it is claimed, if they could not be considered at a special session, to make it necessary to transmit them to such session would be requiring a vain and useless act to be done by the Secretary.

We readily assent to the construction placed on this section by counsel for relator, *i. e.*, that it is made the duty of the Secretary of State to transmit all such bills to the first session of the Legislature, whether general or special, after they are filed in his office; but we cannot agree with counsel that to transmit them to a special session would be a useless act, simply because they could not, as a matter of course, be acted upon at such session. On the contrary, their transmission to such session seems a matter of necessity, because the Governor may deem it necessary to call attention to them and require their consideration. But if the Constitution only required the Secretary of State to transmit them to the Legislature at its *general* sessions, it is clear no power could compel him to transmit them to a special session, though the Governor call attention to and request action upon them.

There is therefore a necessity in requiring the transmission of such bills to the Legislature at its special as well as regular sessions. In such case, that body would probably have possession of such bills, and could properly act upon or reconsider them if the Executive should direct attention to them. It is also claimed that the transmission by the Secretary of such vetoed bills, together with the Governor's objections thereto, to the Legislature, is a calling of attention to them by the Governor. We do not believe the Constitution warrants any such conclusion. The Executive's objections to a bill, or reasons given by him for withholding his approval, is not calling attention to business upon which legislative action is necessary. What is meant by the words "such other legislative business as the Governor may call to the attention of the Legislature while in session?" Clearly such business as the Governor may deem it necessary for the Legislature to transact, and upon which he may solicit action—the business for which the special session is convened, or such other business as may be called to the attention of that body

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by some message coming from the Governor during the session, and upon which he may ask legislative action. Many subjects may incidentally be referred to in the Executive messages upon which no action whatever is required, but it will hardly be claimed that such incidental reference would authorize legislation upon all such subjects at a special session. The evident object, it seems to us, is to restrict legislation at such sessions to those subjects which the Governor may deem it necessary to legislate upon. If such be not the object, why was any restriction whatever placed upon the Legislature at its special sessions, or any control over its power given to the Executive? If we are correct in the construction which we place upon Sec. 9, above referred to, it cannot be said that the Governor's objections to a bill filed with the Secretary of State before the convention of the special session is such a calling of attention to the bill as to justify its consideration at such session. We are satisfied that the Legislature, at a special session, can only legislate upon such subjects as are specially called to its attention by the Governor, with a view to secure legislative action thereon.

Mandamus refused.

STATE OF NEVADA, RESPONDENT, *v.* JAMES BRANNAN
AND THOMAS KELLY, APPELLANTS.

An indictment which merely states that defendants did "attempt to take, steal, and carry away" certain chattels, etc., without setting out the acts done, or mode and manner of the attempt, is not sufficient under our statute to support the charge of "attempting to commit grand larceny."

APPEAL from the District Court of the Third Judicial District, Washoe County, Hon. C. N. HARRIS, presiding.

T. D. Edwards and *Thos. Wells*, for Appellants.

R. M. Clarke, Attorney General, for Respondent.

Opinion by LEWIS, J., full bench concurring.

The defendants were indicted, tried, and found guilty upon a charge of an attempt to commit the crime of grand larceny, an

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offense recognized by the statute of this State. The case comes before this Court on a bill of exceptions, in which many errors are complained of. But the principal point relied on is insufficiency of the indictment, which it is claimed is so defective that no judgment could properly be rendered upon it. An indictment should set out all the prominent facts and circumstances constituting the crime charged against the defendant. It is not sufficient simply to charge him in general terms with having committed a certain crime. It is necessary to state those facts which show the manner in which the crime charged was committed. The simple charge that the defendant committed a certain crime, at a certain time and place, is not sufficient. The means by which it was accomplished, or the acts showing the attempt, (when the crime consists of an attempt) must be set out. In this case, it is simply charged against the defendants that they did, on the eighteenth day of October, A.D. 1866, in the County of Washoe, and State of Nevada, "feloniously attempt to steal, take, and carry away, from what is known as the Napa Quartz Mill, amalgam of the value of \$1,000, the property of Lloyd Rawlings."

The *manner* in which such attempt was made is not shown, nor are the *facts* showing that they did make such attempt, anywhere stated in the indictment. This is very much like charging the commission of murder at a time and place in general terms, without in any way stating the manner in which it was committed. Suppose the witnesses for the prosecution in this case had simply sworn that the defendant attempted to commit grand larceny by stealing amalgam from the Napa Mill; surely that would amount to nothing. To authorize a conviction, it would be necessary to state the *facts* upon which they founded the conclusion that such an attempt had been made, so that the jury might judge for themselves whether the defendants had attempted the commission of the crime charged against them. The jury might, from the same facts, draw a very different conclusion from that drawn by the witnesses. Hence, the necessity for showing the facts upon which such conclusion is based. So in the indictment, it is necessary to state the particular manner in which the crime is committed, and it is not sufficient simply to state general conclusions from the facts.

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As the Attorney General admits the insufficiency of this indictment, we do not deem it necessary to give it any further consideration.

The statement does not contain all the evidence adduced at the trial. We are therefore unable to say whether the case should be resubmitted to another grand jury or not.

Judgment reversed.

THE STATE OF NEVADA EX REL. H. O. BEATTY, RESPONDENT, *v.* E. RHODES, APPELLANT.

In the payment of a debt, legal tender notes are in contemplation of law equal to coin; an Act of the Legislature, therefore, making the salary of a State officer payable in legal tender notes after it had previously made it payable in coin, is not rendered unconstitutional by that section of the Constitution which declares that the salaries of certain officers shall not be increased or diminished during the term of office.

This constitutional provision only prohibits the Legislature from increasing or decreasing the number of dollars in lawful money at which the salary of an officer is fixed, at the time of his election.

APPEAL from the District Court of the Second Judicial District, Hon. C. N. HARRIS, Judge of the Third Judicial District, presiding.

The relator's petition for mandamus was as follows:

"H. O. Beatty, of said county, being duly sworn, says that at the general election held in and for the State of Nevada, on the first Tuesday next after the first Monday in November, A.D. 1864, being the eighth day of said month, he was duly elected one of the Justices of the Supreme Court of said State; that afterwards, to wit: on the day of in said year, it was duly determined by lot, in accordance with the provisions of the Constitution in relation thereto, that he should fill the term of four years from and including the first Monday in January, A.D. 1865; and that on the day of A.D. 1864, he received his certificate of election, and on the fifth day of December, A.D. 1864, he duly qualified by taking the oath of office prescribed by the Constitution of said State, and entered upon the duties of said office.

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Said deponent further says that he is still a Justice of said Court, and that his term of office as such Justice will not expire until four years from said first Monday in January, A.D. 1865.

Said deponent further says that, by the Constitution and laws of said State, the salary of the Judges of said Supreme Court was fixed at the sum of seven thousand dollars per annum; and that by the laws of said State and of the Territory of Nevada prior to the existence of said State, all payments into and from the Treasury of said Territory and State were payable only in gold coin until the first day of April, A.D. 1866; and that by the Constitution of said State, it is provided that the salary of Justices of said Supreme Court shall not be diminished during the term for which they shall have been elected.

Said deponent further says, that under and by the provisions of the Constitution of the State of Nevada and of the statutes of said State, it became and was the duty of the Treasurer of said State to set apart, in *gold coin*, on the first day of the present quarter, to wit: on the first day of April, A.D. 1867, or as soon thereafter as there should be in said Treasury such amount of gold coin from the revenue of said quarter, and not otherwise appropriated, the sum of seventeen hundred and fifty dollars, as a portion of the Judicial Salary Fund of said State, for the payment of the salary of this deponent during the present quarter.

This deponent further says that E. Rhodes is now, and for more than two years last past has been Treasurer of said State; that heretofore, to wit: on the day of June, A.D. 1867, there was and still is in the Treasury of said State, which had come into said Treasury from the revenue of said State this present quarter, the sum of seventeen hundred and fifty dollars in gold coin, which is not otherwise appropriated by law; that on said day of June, A.D. 1867, at Carson City in said State, this deponent demanded of said E. Rhodes, Treasurer as aforesaid, that he would so as aforesaid set apart from such money, so as aforesaid coming into said Treasury from the revenue of said quarter not otherwise appropriated, in gold coin, the sum of seventeen hundred and fifty dollars for payment of the salary of this deponent for said quarter.

With this demand the said Rhodes refused to comply, on the

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ground that the law requires him to pay the salary of the Judges of the Supreme Court in legal tender notes ; at the same time admitting that there was gold coin in the Treasury properly applicable to the payment of the Judges' salary, if the law requiring them to be paid in legal tender notes should be held to be unconstitutional.

In consideration of the premises, your petitioner prays this honorable Court for the issuance of a writ of mandamus, ordering and directing the said E. Rhodes, Treasurer as aforesaid, to set apart and appropriate out of the gold coin now in the State Treasury the sum of \$1,750, to pay petitioner's salary for the quarter ending on the thirtieth of June, 1867, or to show cause on the — day of —, 1867, why he has not done so.

And this deponent further prays this Court for such other and further relief as this Court can, in good conscience, and in the administration of equity lawfully grant."

R. M. Clarke, Attorney General, for the Appellant, made the following points :

The Constitution of the State of Nevada fixes the salaries of the Judges of the Supreme Court at seven thousand dollars per annum, without specifying the kind of currency in which they are to be paid. By an Act of the Legislature passed in the year 1864, these salaries were made payable in gold or silver coin. Afterwards this law was repealed, and the salary made payable in legal tender notes. This last law, it is claimed by relator, is unconstitutional, and so it was held by the Court below.

The Constitution of the State of Nevada fixing the salaries of the Justices of the Supreme Court does not provide gold coin, but *money generally*. (Const. Art. XVII, Sec. 5.)

It was clearly the intention of the Constitution to provide *currency* or legal tender notes of the United States. (Debates, 156, 157, 282, 288, 304, 600, 616.)

Having provided *coin* for the official reporter, in the Constitution, it is evident the difference between the currencies was brought to the attention of the Convention ; and furthermore, that in all other cases *currency* was to be the rule. *Provisio unias, etc.* (Art. XVII, Sec. 26, Debates 751.)

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The Constitution providing "*money*," the presumption is that payment in currency was intended. (*Cox v. Smith*, 1 Nev. 170.)

The Act of January 17th, 1867, requiring the Judge's salary to be paid in gold coin is unconstitutional.

1st. Because in derogation of the letter and spirit of the Constitution of this State. (Art. XVII, Sec. 5; Art. VI, Sec. 15, Debates 729.)

It increases the salary as fixed by the Constitution, upon the theory of the petitioner.

The Legislature had no right to do more than appropriate money. (Art. VI, Sec. 15.)

Because in derogation of the laws of the United States. (*Milliken v. Sloat*, 1 Nev. 582, 583, 596.)

This Court cannot enter upon an inquiry touching the difference in the value of the currencies, and as they are equivalent in law and as the Treasurer had before action set apart currency, petitioner was not damaged and is estopped. (*Milliken v. Sloat*, 1 Nevada, 583.)

The Act of 1865 (Statutes 64-5, p. 98) is no part of the contract between the State and the petitioner, and may therefore be modified or repealed at any time. (4 Little, 46; 13 B. Monroe, 385; 18 Maine, 112; 3 Denio, 276, 277; 15 Cal. 429, 454.) The Legislature has repealed it. (Laws 1866, 135, 190; *Id.* 74.)

The change from one lawful money to another, and especially as to salaries, cannot be held to impair the obligation of a contract. (7 Ind. 158; 27 N. Y. 454, 455, 456; 26 Miss. 15 U. S. Dig. 108.)

If the Acts of 1866 reduce the salary, does not the Act of 1865 increase it? Do not the Acts of 1866 simply restore the Judges' salary to the basis originally fixed by the Constitution? (Act 1866, pp. 74, 135, 190.)

George A. Nourse, for the Relator.

The term of Relator is admitted to have commenced on his taking the oath of office, December 5th, 1864, and to extend to first Monday in January, 1869.

The Constitution of this State fixed the salary of the Justices of

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the Supreme Court of said State for their first term, at seven thousand dollars per annum, but did not specify in what kind of currency it should be paid—whether coin dollars or paper dollars. (Article XVII, Sec. 5, State Constitution.)

At that time two kinds of money or currency existed, and still exist—each made by the laws of the United States a legal tender in payment of debt, dollar for dollar; but *really* of unequal value. Were it not so, no law would be needed in making United States Treasury Notes a legal tender, for a debtor would as lief pay coin as paper, if there were no difference in their *real* value. (*Cox v. Smith*, 1 Nev. 169–70; *Milliken v. Sloat*, Id. 583.)

It was competent for the Legislature to make this salary payable in either paper or coin originally. They were only required to “set apart from each year’s revenue a sufficient amount of *money* to pay such compensation.” Setting apart either coin or paper money would have complied with this requirement. (Art. VI, Sec. 15, State Constitution.)

The first Legislature of the State, by providing for the setting apart of *coin* as a fund from which alone the salary of the Justices of the Supreme Court could be paid, made that certain which by the Constitution had been left uncertain. Thenceforth the salary of the Justices of the Supreme Court was 7,000 *coin* dollars. (Laws of 1864–5, 97–8.)

The Constitution provides that the salary of said Justices “shall not be increased or diminished during their continuance in office”; and again, while authorizing the Legislature to increase or diminish the salaries fixed in the Constitution, it expressly provides that “no such change of salary or compensation shall apply to any officer during the term for which he may have been elected.” (Art. VI, Sec. 15, State Constitution; Art. XV, Sec. 9, Id.)

The Legislature of the State subsequently passed bills providing for the payment of salaries, etc., “in any currency made by the laws of the United States a legal tender,” and requiring the Treasurer to convert into greenbacks all the coin in the State Treasury not needed to pay bonds or interest. (Pages 135, 190, Laws of 1866.)

But these laws, if construed to direct and compel the Treasurer

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to pay the salary of the then incumbents of Judicial and State officers in greenbacks during their then existing term, were unconstitutional and void ; for it cannot be questioned that a salary is "diminished" by keeping it at the same number of dollars, but making it payable in dollars severally of less value than the kind of dollars in which it was originally payable, just as truly as if it was changed to a less number of dollars, each dollar remaining of the same value as before.

So then, these being laws (if construed to make it the Treasurer's duty to pay these salaries in greenbacks) for the diminishing the salaries fixed by the Constitution, are, under Sec. 15 of Art. VI of State Constitution, void as to those then in office during their then existing terms of office ; or to state it more clearly, are to be construed under Sec. 9 of Art. XV, as if the *proviso* of that section were annexed to said laws, to wit: "*Provided*, that no such change of salary or compensation shall apply to any officer during the term for which he may have been elected."

These laws, then, being of no effect as to the relator during his present term of office, are to be treated for the purposes of this action as if they had no existence. The defendant's duty, then, is only to be gathered from the original statute as to payment of salaries of Justices of the Supreme Court, hereinbefore cited, to wit: Laws of 1864-5, pp. 97-98.

H. O. Beatty, for himself.

The first proposition I lay down is this : The salary of the Judges is fixed in the schedule of the Constitution, for the first Term, at \$7,000 per annum.

At that time there were two unequal currencies ; one of only about half the value of the other. (See *Cox v. Smith*, 1 Nev. 169-70.)

The Constitution as it came from the hands of the convention did not determine the kind of currency in which this \$7,000 was to be paid. It was left an open and unsettled question, to be determined by the first Legislature how these payments should be made. Sec. 15 of Art. VI requires legislative action on the subject. It requires the Legislature to provide for regular quarterly payments.

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Will it be contended that when the Legislature was called on to pass an Act for the regular quarterly payment of salaries, it was inhibited from saying in what currency they should be paid? That the kind of currency was to be left to the discretion of the Treasurer, allowing him to pay one Judge, if he saw fit, in gold, and another in currency? If this absurdity is not contended for, then it must be admitted the first law passed by the Legislature making the salaries payable in gold coin, was a valid act. If it was a valid act, then salaries of the Judges elected for the first Term became fixed at \$7,000 in gold coin.

If they did become so fixed, then the Legislature might at any time repeal or alter the law so fixing the salary or compensation; but by the provisions of Sec. 9, Art. XV, the law would not take effect so as to change or alter the salary of those then in office, but would only affect those thereafter to be appointed or elected.

If the foregoing propositions be true, the salary of petitioner is fixed at the rate of \$7,000 per annum in *gold coin* for the remainder of his term.

Then there remains one other point to discuss. It may be contended that although the salaries of the Judges are fixed by the Constitution and laws of the State at \$7,000 in *gold coin*, yet the State, like an individual, may disregard this provision of her own contract, and pay in anything which the law of the United States declares a legal tender for debt. I shall not dispute that proposition. The State may disregard her obligation to pay in *gold*. She may go further: she may refuse to pay in anything. There can be no doubt if a constitutional convention was called to amend the Constitution, that convention in a new or amended Constitution might provide that the present Judges should remain in office at a salary of \$7,000 in greenbacks. It might also provide that any arrearages of salaries should be paid in greenbacks. Nay, it might provide that all arrearages of salary should be forfeited to the State, or never paid to those entitled, which would be an indirect forfeiture. And if such a Constitution were ratified by the people, that would be the end of the matter; for it is certain no suit can be maintained against a State.

But whilst the people in their sovereign capacity could do such high-handed things, the Legislature can do nothing in opposition to

the Constitution under which they are elected. They are the agents of the people, with powers strictly limited.

Let us illustrate this by a case of private agency. A owes B \$1,000, which he has promised to pay in gold. A takes \$1,000 in gold out of his safe, and delivers it to his servant or agent to carry it to B and pay his debt of \$1,000 then due. On the road the servant changes the \$1,000 in gold into \$2,000 in legal tender notes, and tenders B \$1,000 in payment of his debt. This would not be a good tender, for it would not be a tender by A, but the unauthorized act of A's servant. In such case, if B should take the \$1,000 in greenbacks in ignorance of A's having sent the gold, there can be no doubt but an action would lie against the servant for the \$1,000 in currency had and received.

Whether it would be at the suit of A or B might be doubtful; but certainly one or the other could recover.

So, too, in the case of Nevada State bonds, the Legislature has set apart gold coin to pay the annual interest thereon.

Under the decision in *Milliken v. Sloat*, no doubt the *State* might, if it chose to violate its plighted faith, pay the interest in greenbacks. But no one will contend the Treasurer can do so.

That case simply decided that the debtor (not the debtor's servant) might elect to pay either in gold or legal tenders. That such election remained with him up to the time the debt was finally discharged, and no Court could control it; and the debtor could not deprive himself of that right of election by any contract he might enter into. But the Treasurer is not the *State*; he is not the *debtor*; he has not the election.

In the case of State bonds, the *State elects*, through its Legislature, to pay in gold. This the Legislature has a right to do because its powers are general, and there is no constitutional restriction in this respect.

In the case of salaries, the election is made partly by law of the Legislature, and partly by the Constitution. Let it be considered that when the laws were passed providing for a change in the manner of payment, the ninth Section of Art. XV provides that such laws shall not affect present incumbents; and it is clear enough what is the duty of the Treasurer. Had this *proviso* been contained in

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the law, the Treasurer would never have hesitated about setting apart petitioner's salary in gold. But the law is found on one page of the Statutes, the constitutional proviso on another, and the Treasurer has failed to connect them.

The petitioner merely seeks to compel the Treasurer to perform his official duty as prescribed by the Constitution and legislative enactments, the Constitution of course prevailing where there is any conflict.

Opinion by LEWIS, J., JOHNSON, J., concurring.

Upon the first argument of this case I confess I was fully of the opinion that the writ ought to issue, but after further and more mature consideration, I am satisfied my first conclusion was incorrect. Nor do I hesitate to say that I entered upon the examination of the case with a desire to grant the peremptory writ, if it could be done upon correct legal principles; because we all know it was the general understanding, not only among the first State officers, but among the people at large, that the salaries of such officers would be payable in gold and silver coin; and I deeply regret that the law will not afford the learned relator the relief to which in my judgment he is justly entitled. But the members of the profession well know that the law, though embodying the wisdom of centuries, though adorned by the learning and improved by the genius of profound jurists and great statesmen, has not yet attained to such perfection as to afford a remedy where justice gives a right. As in this case, whilst I believe the relator is justly entitled to the relief which he asks, yet I do not think the law warrants the issuance of the peremptory writ, and in this the law fails to meet the requirements of justice. But the reasons which have led me to my present conclusion appear to me so perfectly conclusive, that I could not consent to an affirmance of the judgment below without a consciousness that I had disregarded the letter of the law.

Before proceeding to the discussion of the questions upon which counsel for relator and myself differ, and that the real ground of difference may be better understood, I will mention the points in this case upon which we seem fully to agree: and first, I admit that gold coin and legal tender notes are in legal contemplation

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equivalent, only for one purpose, namely: for the payment of debts public and private: that in the market there is an actual difference between these two currencies; second, that this is in no sense a proceeding to recover a debt; third, that it was the object of the framers of the Constitution so to regulate and fix the salaries of the Judges of the State as to place it out of the power of the legislative department to increase or diminish such compensation during the time for which they may be elected. I admit, if there be a present existing law of the Legislature making the relator's salary payable in gold coin, and directing the Treasurer of State to set apart that kind of currency for its payment, that this writ ought to issue, and that in such case the setting apart by the Treasurer of legal tender notes would be no answer or defense to this proceeding. But in my opinion there is no such law, and here is the point upon which we differ. It is claimed on behalf of the relator, that his salary was fixed in the Constitution at \$7,000 per annum; that, as there were at the time of the adoption of that instrument two kinds of lawful money current in this country, one being more valuable than the other, it became the duty of the Legislature at its first session, to specify the kind of money in which such salary should be paid; and having done so by making it payable in gold coin, which was the most valuable currency, that the Legislature could not during his term of office repeal that law or make his salary payable in the less valuable currency, because it is said such change would result in diminishing his compensation, which it is conceded cannot be done. I admit that if the change from one currency to another "diminished" the salary, in the sense in which that word is used in the Constitution, the Legislature had no right to make such change, and any law passed by it for that purpose would be unconstitutional and void. But in my opinion it was not the intention of the framers of the Constitution to place any restriction upon the will of the Legislature as to the kind of lawful money in which it should cause the salaries of the various officers to be paid, or to prohibit it from changing after it had once fixed the kind. The provision inhibiting the increase or diminution of an officer's compensation during his term of office, can mean nothing more than that the number of dollars in lawful money of the United States

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shall not be increased or diminished during such term. And it being conceded that the relator's salary is a debt, the law which changed the kind of dollars in which it should be paid is not repugnant to the Constitution, provided the same number of dollars in lawful money is maintained, as in such case it cannot be said that the salary is legally reduced, though in fact it may be. If my construction of the constitutional provision above referred to be correct, the correctness of the result to which I have arrived can hardly be questioned. That such is the proper construction I will hereafter endeavor to show.

It may be assumed, for the purposes of this case, that the Legislative power of a State is unlimited, except as it may be restricted by the Constitution and laws of the United States, and the Constitution of the particular State. It has not the power to enact any law conflicting with the Federal Constitution, the laws of Congress, or the Constitution of its particular State. With these restrictions, the Legislature of any State is perhaps as omnipotent in its legislative power as the British Parliament itself. It is conceded on all sides that the law by which the relator's compensation was made payable in treasury notes instead of gold coin, and which repealed the law making it payable in coin, is not in conflict with any provision of the Federal Constitution, with any Act of Congress, or with the Constitution of this State, unless it diminished the relator's salary, in which case it would of course be unconstitutional. The provision with which it is claimed this law conflicts reads as follows: "The Justices of the Supreme Court and District Judges shall each receive quarterly for their services a compensation to be fixed by law, and which shall not be increased or diminished during the term for which they shall have been elected, unless in case a vacancy occurs, in which case the successor of the former incumbent shall receive only such salary as may be provided by law at the time of his election or appointment." (*Vide* Constitution, Art. VI, Sec. 15.) Does this section so restrain the power of the Legislature that it cannot constitutionally make the relator's salary payable in legal tender notes, after having first made it payable in gold coin? In my judgment it does not. Whilst it is perfectly apparent that this section of the Constitution prohibits the Legislature from

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reducing the number of dollars of lawful money to be paid during the term of an incumbent, I cannot believe it was intended that the actual or market value of the dollar itself was to be taken into consideration in determining whether such salary was increased or diminished.

It was known to the members of the Convention who framed the Constitution of this State, that the power of coining money and of declaring what should and should not be lawful money in the United States rested entirely with the Federal Congress. It was well known that the gold and silver dollar could at any time be debased, so that whilst its intrinsic value might be greatly diminished its nominal value would be the same. This is a power which Congress not only possesses, but which it has often exercised, and that power is, I apprehend, unlimited.

Can it be believed that the Constitution of this State has so trammelled the Legislature that it cannot make its entire revenue payable in the debased currency? If it can do that, it would seem that it could, without violating the constitutional provisions above referred to, pay its officers in such debased coin at its nominal value. Again: although the members of the Constitutional Convention knew that the lawful money of the United States might at any time be debased, so that its intrinsic or actual value might be reduced to an unlimited extent, whilst its nominal value remained the same, yet they in express terms deprived the Legislature of the power of increasing the number of dollars, so as to make up the decrease in the real value of the dollar itself. If it were the intention to maintain the salary or compensation of officers at the same actual value during their entire term, the Legislature would not surely have been deprived of the power of nominally increasing such salary, (as it certainly is) whilst it was known that it might, at any session of Congress, be decreased in fact by a debasement of the coin. Being fully aware of the possibility of such action on the part of the Federal Congress, is it not fair to presume that the power to increase the nominal amount of the salary, so that it should not in fact be decreased by any such Act of Congress, would have been left with the Legislature?

If this constitutional inhibition makes it incumbent on the State

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to pay its officers in currency of the same intrinsic or actual value during the entire term for which they may be elected, then it is evident that the Legislature might be compelled to collect the revenue of the State in dollars of the coinage of a particular year, those of a previous or subsequent year being perhaps of greater or less real value, or to send its Treasurer into the market to purchase a sufficient number of dollars of that special year's coinage for the payment of its officers. It will hardly be contended that any such thing has ever been contemplated.

The same construction must be placed upon the Constitution of the State as is generally placed upon like language in other Constitutions. The Constitution of the United States declares that Justices of the Supreme Court "shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." (Art. III, Sec. 1.) In the year 1834, the gold coin of the United States was so debased that an eagle coined prior to that year was worth sixty-six cents more than the eagle coined after. Can it be claimed that the Judges in office at the time of such debasement could insist upon being paid in the money coined prior to the year 1834, or upon a sufficient increase in the number of dollars to make up the decrease in the real value of the dollar itself? That, I believe, was never claimed. If it be correct that the Constitution does not restrict or attempt to control the Legislature as to the kind of lawful money in which it shall pay the salaries of its officers, but only as to the number of such dollars, it follows, as an unavoidable conclusion, that a law simply changing the kind of money in which a salary is made payable, but maintaining the same number of dollars in lawful money, could not be said to conflict with the constitutional provision under consideration.

But if this conclusion be incorrect, there is another answer to relator's position, which seems to me entirely conclusive. The Act of Congress making treasury notes lawful money and a legal tender for all debts, public and private, was the supreme law of the land at the time of the adoption of the Constitution of the State, and is above and must control that Constitution itself. Thus gold, and silver, and treasury notes to a limited extent, are made lawful money and a legal tender for all debts. So far as legislation of Congress can make gold and

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treasury notes equivalent for the payment of debts, it has been done. For that purpose the currencies are absolutely equivalent, dollar for dollar; and if there be any difference, it is the result of higher laws and causes, which Congress cannot control. No legislative Act could make them more perfectly equal than they are now. The value of all currency, as compared with other things, may be controlled by the demand and supply, as the value of anything else may be. That value no legislation can well control and govern. But by the sovereign power vested in it, Congress may make a paper dollar equivalent to a gold dollar for the payment of all debts. This it has done. The law being supreme, it is made the duty of all the Courts of the country to treat treasury notes as the exact equivalent of gold for the purposes mentioned in the Act of Congress. They have not the power to look upon that Act to ascertain the real or market value of either of the currencies. The law says that a piece of paper issued by the Government is a dollar, and lawful money for the payment of debts; it says nothing more with respect to the gold which is coined for the same purpose. When treasury notes are offered in payment for a debt, the Courts have no more right to inquire as to their market value, and pronounce them of that value only, than they have to calculate the value of gold coin by the quantity of pure metal which it may contain. The Act of Congress alone determines the value of the paper dollar and the gold, when it is sought to use them for the payment of a debt, public or private. It is admitted that the relator's salary, which was fixed in the Constitution at seven thousand dollars, and which was by the Legislature afterwards made payable in gold coin, is a debt. Upon this there is no controversy. Now then, did the Act of the Legislature, making the salaries of the Justices of the Supreme Court payable in treasury notes, and repealing the former Act which made them payable in gold coin, diminish those salaries so as to make the Act repugnant to the Constitution? Certainly not. Because the salary being a debt, and legal tender notes being equivalent to gold for the payment of it, there is no such diminution as the Courts can recognize.

As the Act, which it is said is unconstitutional, did not reduce the number of dollars fixed in the Constitution and the first Act of

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the Legislature, but only provided for the payment of the salaries in a currency which, though different in kind, is nevertheless equivalent to gold for the payment of such salaries, the relator's compensation is not, in legal contemplation, reduced. Unless it can be said that treasury notes are not equivalent or equal to gold for the payment of a debt, I am unable to see how the Act in question can be declared unconstitutional.

True, this is not a proceeding for the recovery of a debt; but before the Act of the Legislature can be declared objectionable as diminishing relator's salary, it becomes necessary to ascertain whether it is diminished—whether the Legislature, in repealing the Act by which his salary was made payable in gold, provided a substitute for the gold coin, which is legally equal to it.

Concluding as I have that it did provide such an equivalent, it follows that the law is not repugnant to the Constitution.

Judgment reversed.

STATE OF NEVADA, APPELLANT, v. W. H. ANDERSON,
RESPONDENT.

That part of the indictment which, under the statutory form, first charges that a defendant has committed a certain crime, is merely formal; and if the body of the indictment sufficiently shows the offense charged, and the facts constituting the offense, it will be held good, notwithstanding any defect in the first clause.

The first clause in the indictment may charge that the defendant has committed a certain crime, (giving its technical name, if it has one) or it may simply charge that he has committed a felony, or has committed a misdemeanor, as the case may be. It is not indispensable in this clause to give the name or description of the offense charged. Nor when the name and description is given, is it necessary to say whether it is a felony or a misdemeanor.

The omission of the word *necessary* from the body of the indictment where the offense is charged, is not a fatal defect. To say a weapon is not drawn in self-defense, is a broader and stronger expression than to say it is not done in *necessary* self-defense. The latter is included within the former expression.

Under the provisions of our Criminal Practice Act it is not necessary to use the exact words of the statute in defining a statutory offense. Words of similar import will suffice.

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APPEALED from the District Court of the Sixth Judicial District, Hon. WM. H. BEATTY, presiding.

P. B. Rankin, District Attorney of Lander County, for Appellant.

The want of a proper description of the offense in the caption of the indictment is immaterial, if it be properly described and charged in the body of the indictment.

The indictment is drawn in conformity to the requirements of the statute, and if there be any defect in form it could not prejudice the defendant; consequently under provisions of Sec. 589 of Practice Act, it does not invalidate the indictment. (See 14 Cal. 572, and 20 Cal. 117.)

The defect, if any, being in the caption and not the body of the indictment, is avoidable. (See Arch. Crim. Practice and Pleadings, 255-60.)

Self-defense is more comprehensive than *necessary* self-defense. The major includes the minor.

Geo. A. Nourse, Attorney General, on the same side.

The indictment is good. It complies with the requirements of Secs. 234-5-6 of the Criminal Practice Act. It only errs in giving a wrong name to the offense; the description of the acts constituting the offense are properly set out.

Whilst the statute gives a form which *may* be followed, it is not disputed that a common law indictment is good. Treating the caption where the misdescription of the offense occurs as surplusage, there still remains a good indictment, which meets all the requirements of Sec. 236.

At common law, it was never necessary to name the offense committed.

It was sufficient if the indictment described the acts constituting the offense.

There is no brief on file in behalf of Respondent.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

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The defendant was indicted under Sec. 40 of an Act entitled "An Act concerning Crimes and Punishments," approved November 26th, 1861, being charged with the crime of drawing and exhibiting a deadly weapon in a rude, angry and threatening manner, not in necessary self-defense. It seems to have been the purpose to draw the indictment in conformity with Sec. 235 of the Criminal Practice Act, and it commences by charging that "William H. Anderson is accused by the Grand Jury of the County of Lander and State of Nevada, by this indictment, of the crime of drawing and exhibiting a deadly weapon in a rude, angry and threatening manner, committed as follows;" then follows a statement of the facts constituting the crime of which the defendant is charged, which, without what is quoted above, would constitute the body of a good common law indictment.

The defendant interposed a demurrer, claiming the indictment to be insufficient. First, because in that portion of it which we have set out he is not charged with any crime known to the law, in that it does not show that the weapon was not drawn and exhibited in *necessary self-defense*; and secondly, because in the body of the indictment he is charged with having so drawn and exhibited the weapon in a "rude, angry and threatening manner, and not in the self-defense of him, the said William H. Anderson," whilst it should have charged that it was not drawn and exhibited in his *necessary* self-defense. The Court below sustained the demurrer, and the State appeals. With the exception of these two defects the indictment appears to be formal and sufficient. Whether these defects were sufficient to justify the Court below in sustaining the demurrer, is the question now to be determined. We are of the opinion they were not.

That part of the indictment charging the defendant with the commission of a crime by name, and which we have already quoted, is simply formal, and could be omitted entirely. It is only a conclusion from the facts which are afterwards recited. It was not required at the common law, and it has been frequently held in California, upon a Practice Act similar to ours, that an indictment in the common law form is good. The two hundred and thirty-fifth section does not make it absolutely necessary to follow the form

there prescribed. It only provides that it may be substantially in that form.

But the two hundred and forty-third section of the same Act declares what shall be deemed a good indictment, and that presented in this case seems fully to meet its requirements. It shall be sufficient if it "can be understood therefrom: first, that it is entitled in a Court having authority to receive it, though the name of the Court be not accurately set forth; second, that it was found by a Grand Jury of the District in which the Court was held; third, that the defendant is named, or if his name cannot be discovered, that he be described by a fictitious name, with a statement that he has refused to discover his real name; fourth, that the offense was committed at some place within the jurisdiction of the Court; fifth, that the offense was committed at some time prior to the finding of the indictment; sixth, that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; seventh, that the act or omission charged as the offense is stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction, according to the right of the case." The indictment in this case is entitled in the District Court for the County of Lander, which had the authority to receive it. It was found by a Grand Jury impaneled for that county. The defendant is correctly named. It is charged that the offense was committed in the County of Lander and State of Nevada; that it was committed prior to the finding of the indictment; and the acts constituting the crime are clearly and distinctly set out in ordinary and concise language, and in a manner so as to make it easily understood; of that there seems to be no question, except so far as has been already mentioned; and finally, the whole is charged with all the certainty possible. Surely, then, if this section of the Practice Act amounts to anything, the indictment is sufficient, for it fully meets all of its requirements.

By the form prescribed in the statute, it will be observed the defendant may be charged in that part of the indictment which has been quoted with the crime for which he is indicted by name, or

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with having committed a "felony or misdemeanor," as the case may be. When all the facts constituting the crime are clearly, fully and artistically charged in the body of the indictment, to require the statement in the commencement that defendant is charged with a "felony" or "misdemeanor" would seem to be entirely unnecessary. As no such charge is necessary at common law, the question of whether the crime charged was a felony or a misdemeanor being determined by the facts stated and the technical words employed, we are not disposed to hold an indictment insufficient from which that part is entirely omitted, or in which it is informally stated. Nor is the omission of the word "necessary," in the description of the offense in the body of the indictment, in any way material. It is charged that the weapon was not drawn and exhibited in "self-defense." This is a broader and stronger negative than the statute requires, for if it was not drawn in "self-defense" it certainly was not in "necessary self-defense." The words employed in the indictment include those of the statute, and are therefore sufficient. Whilst it appears to be the object of the Criminal Practice Act to retain the substance and all the material allegations of the common law indictment, it seems to be no less its object to sweep away all unsubstantial and immaterial requirements.

It is not necessary under our practice, as it was at common law, to charge a statutory offense in the exact language of the statute defining it. Sec. 242 declares that any words of the same import may be employed.

The judgment sustaining the demurrer is reversed.

State of Nevada v. Herrick.

STATE OF NEVADA, APPELLANT, v. H. S. HERRICK,
RESPONDENT.

A defendant tried on a criminal charge and found not guilty by a jury cannot again be put on trial for the same offense.

THIS was an appeal from the District Court of the Sixth Judicial District, Hon. W. H. BEATTY, presiding.

The defendant, a county officer, was indicted for purchasing county scrip, in violation of the statute in that regard. On the trial, the District Attorney offered in evidence a certain county warrant, which he proposed to show the defendant had purchased for his own use whilst holding a county office. The defendant objected to any proof being made in regard to that scrip because it had no United States Revenue Stamp. The Court below sustained the objection that the warrant being without a stamp was void, and therefore the defendant committed no offense in buying it.

The District Attorney having no other evidence to sustain the indictment, the jury were directed to bring in a verdict of acquittal. The State appealed from the judgment, and assigned the ruling on this evidence as error. The whole argument turned on the propriety of admitting or rejecting the evidence offered. The Court, however, did not decide the point; holding that where a party is found not guilty on a sufficient indictment, he cannot again be put upon his trial, notwithstanding errors may have been committed during the trial adverse to the prosecution.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

The record shows that the defendant was tried and acquitted. He cannot again be tried for the same offense. The appeal should not therefore have been taken, and must be dismissed.

So ordered.

Sargent v. Collins.

H. E. SARGENT, APPELLANT, v. S. W. COLLINS ET AL.,
RESPONDENTS.

A party can only be bound on a note executed in a firm name who is actually a member of the firm executing the same, or has held himself out as a member so as to give the firm credit on his responsibility.

The fact that C. & S. entered into a written contract with F. & P. to excavate a certain tunnel, is not conclusive evidence that S. was a member of the association known as C. & Co., who did actually prosecute the work on the tunnel. C. & Co. may have been subcontractors under C. & S.

Where the parties to a suit agree that a deposition may be taken at a certain place, during a certain month, before T., a notary public in another State, the deposition certified by T., made under his official seal as a notary, may be read by either party without other proof that T. was a notary when the deposition was taken. The seal is *prima facie* evidence of his official character.

When C. & S. contracted with F. & P. by written contract to run a certain tunnel, it was not contradicting the writing to show in a controversy with an employer of C. & Co. that C., in conjunction with G., M. & P., partners, doing business under the firm name of C. & Co., did actually prosecute the work, and that S. had no concern or participation therein.

Per JOHNSON, J., *dissenting*.—When parties to a suit agree that the deposition of a witness may be taken at a certain place (out of the State) on the day of a certain month, before F. J. T., a notary public, the deposition cannot be read without proof, (beyond his own certificate) that F. J. T. was a notary when the deposition was taken. His seal in such case is not evidence of his official character.

If the agreement admits T. was a notary when entered into, it does not admit that he would continue to be a notary until the taking of the deposition.

Although parties may agree that a private individual may take depositions, still, if they consent that a certain person holding office may as such officer take a deposition, it cannot be held that they consented he might take it as a private individual.

APPEAL from the District Court of the Fourth Judicial District, County of Lyon, Hon. WM. HAYDON, presiding.

Wells & Kennedy, for Appellant, made the following assignment of errors :

1st. The Court erred in overruling plaintiff's demurrer to defendant N. P. Sheldon's answer.

2d. The Court erred in allowing the deposition of S. W. Collins to be read as evidence on the trial of said cause.

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3d. The Court erred in permitting the defendant Sheldon to testify that he was not a member of the firm of Collins & Co., such evidence tending to vary, contradict and destroy his own written contract in evidence herein.

4th. The Court erred in overruling plaintiff's motion for a new trial.

Robert M. Clarke & W. M. Gates, for Respondents.

S. W. Collins & Co. is alleged in the complaint to consist of Collins, Sheldon, Gross, Martin, Breed and Chase. The only issue in the case is: Was N. P. Sheldon a member of that firm, or did he hold himself out to the plaintiff as such?

The record, under the most favorable view for the appellant, shows a conflict as to whether he was or not a partner. There being a conflict of evidence, this Court will not reverse the case.

The record does not even show it contains all the evidence on this point, therefore this Court cannot reverse the case. (See *State v. Bonds*, 2 Nev. 265.)

The weight of evidence shows he never held himself out as a partner.

The fact that Collins & Sheldon entered into a contract with Fitch & Peck to run a tunnel, is not conclusive evidence that Sheldon was a partner with Collins, Gross, Breed and Chase in hiring laborers and excavating the tunnel. Nor is there any rule of law which would prevent Sheldon, when sued with Collins, Gross, Breed and Chase on a contract made in the name of S. W. Collins & Co., from showing he was not a member of that firm, although Collins & Sheldon may have contracted at one time to do the work which was subsequently executed by S. W. Collins & Co. The fact that Collins & Sheldon once entered into a contract with Fitch & Peck, does not prove that subsequently Collins, Sheldon and three others entered into a contract with Sargent, the plaintiff in this action. Nor is there any rule of law precluding Sheldon from proving he did not enter into the latter contract because he had entered into the former. Sheldon may at a date subsequent to his contract with Fitch & Peck have turned over the whole contract to Collins. In such case, whilst still responsible to Fitch & Peck, he would not

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be liable for services of persons employed by Collins himself, or he and other associates taken into the operation.

Even if there was a partnership between Collins and Sheldon, it was for mining purposes, and Collins could not bind Sheldon by note. (*Skillman v. Lachman*, 33 Cal. 198.)

The facts of the case appear sufficiently in the opinions of the Court and the statement of counsel.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

The plaintiff brings this action against the defendants Sheldon, S. W. Collins and four others, to recover the sum of fourteen hundred and thirty-eight dollars alleged to be due on a certain promissory note signed "S. W. Collins & Co.," and bearing date May 23d, A.D. 1864. It is alleged in the complaint that the defendants were partners, doing business under the firm name and style of S. W. Collins & Co., and that whilst so doing business they executed and delivered to the plaintiff the promissory note sued on. The summons was served only on Sheldon, and he alone answers the complaint. He denies that he was ever a member of the firm of Collins & Co., that he executed the note sued on, or that he is in any way liable upon it. To the answer, which fully and completely put in issue the liability of Sheldon, the plaintiff interposed a general demurrer, which was very properly overruled by the Court below, and the case proceeded to trial upon the complaint and answer. To establish the partnership between Sheldon and the other defendants, the plaintiff introduced in evidence two written contracts, entered into on the twentieth day of May, A.D. 1861, between Henry S. Fitch and A. Peck, parties of the first part, and S. W. Collins and N. P. Sheldon, parties of the second part, by which, in consideration of some mining ground to be conveyed to them, Sheldon & Collins agreed to run or construct a tunnel for the purpose of prospecting certain mining ground owned by the parties of the first part. Besides these contracts, the only testimony which appears to have been introduced by the plaintiff is related in the record as follows:

"Henry S. Fitch testified that Collins & Co. commenced work

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on the mines about ten days after the contracts were signed, and continued such work more or less until 1864 or 1865. Plaintiff was employed by Collins & Co. in A.D. 1862 to work on the tunnel, and plaintiff's wife was also employed in cooking for the hands at work for Collins & Co. Saw defendant Sheldon at the work about three times in the fall of 1863; never heard him give orders about the work."

Plaintiff Sargent: "I worked for Sheldon & Collins; Sheldon told me to get a stove at Kelley, Mott & Co.'s, which I did; Sheldon said that Collins would do all the business, and that whatever Collins did, he (Sheldon) would agree to."

A. L. Collins: "I was foreman of the mine, and saw the contract in Sheldon's office the day it was executed; Collins, Gross and Martin gave me orders about the work; Sheldon never gave me orders."

Bartholomew Canty: "I worked at the mine in May, 1861; Sheldon paid me four or five dollars for work done on the mine; saw Sheldon at the mine once or twice; he never gave me orders; Collins did."

This appears to be all the evidence introduced by the plaintiff with respect to the partnership or the liability of the defendant Sheldon.

For the defense, Sheldon himself testifies that he was not a member of the firm of Collins & Co.; that he informed the plaintiff at the time he commenced work for Collins & Co. that he would not be responsible for any debts contracted by that firm; that he gave Canty the four dollars alluded to as a matter of accommodation, and not to pay for work on the mine; so with respect to the order given to the plaintiff for the stove.

S. W. Collins testified that the firm of Collins & Co. consisted of E. S. Gross, Minor S. Martin, Philip Richardson and himself; that Sheldon was not a member of the firm, and that he was in no way liable or responsible for its debts or the promissory note sued on; that he, Collins, signed the note on behalf of the firm of Collins & Co. This is the case as made out by the evidence presented to this Court. The testimony is very meagre and probably very incompletely reported; but we can only act upon what is before us, and

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there appears to be nothing in the record to justify a reversal of the judgment. To make the defendant Sheldon liable on this note, it was indispensably necessary to prove either that he was in fact a member of the firm of Collins & Co., or that he induced others to believe he was a partner, thereby giving credit to the firm and inducing third persons to deal with it accordingly.

If he were in fact a partner, and the copartnership were created for a purpose which would make it proper for each member of the firm to bind it by the execution of a promissory note, there would be no doubt of his liability in this action.

Whether Sheldon was a member of the firm, or whether he held himself out as such to the public, are facts not by any means established by the evidence as it is brought before us.

It is claimed by counsel for the appellant, that the contracts between Peck & Fitch and Sheldon & Collins, already referred to, created a partnership between the last two persons. They are doubtless joint contractors; but the contracts do not certainly develop a single feature of partnership between them. A partnership is defined to be a contract between two or more persons, by which they join in common either their whole substance or a part of it, or unite in carrying on some commerce or some work or some other business, that they may share among them all the profit or loss which they may have by the joint stock they have put into partnership. Do the contracts referred to show any engagement between Collins and Sheldon by which they mutually bound themselves to run the tunnel for Peck & Fitch, jointly sharing the profit and loss? Certainly not. Though Collins and Sheldon contract jointly with Peck & Fitch to do certain work, that creates no contract between Collins and Sheldon by which they are mutually bound to each other to do such work on their joint contract. Notwithstanding the contract, each might do his own proportion of the work himself, furnish his own implements, or tools, and pay his own expenses, or might employ others to do his proportion of the work at his own expense. In such case there would be no such mutual obligations, liabilities or interest between them as to create a partnership. To create a partnership, there must be a contract, either expressed or implied, between the parties composing it, by which

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they join in some common enterprise, and share among each other the profit or loss. The mere fact of their joining in the contracts between themselves and Peck & Fitch, no more created a partnership between them than the joint execution of a promissory note would create such relation. But should a partnership between Sheldon and Collins be conceded as having been created by the contracts, the plaintiff's case would not be strengthened in the slightest degree, because it is incontestably established that Collins & Co. was another partnership entirely, composed of S. W. Collins, E. S. Gross, Minor S. Martin, and Philip Richardson—not one of whom, except Collins, is mentioned in the contracts with Peck & Fitch—and there is not a word of evidence in the record tending to prove that Sheldon ever entered into a contract of partnership with these parties; but on the contrary, S. W. Collins swears directly that he was not a member of the firm of Collins & Co., and so he swears himself. If, therefore, it be admitted that the contracts for running the tunnel created a partnership between Collins and Sheldon, it will not certainly be claimed that it also made Sheldon a partner with three other persons not mentioned in those contracts. It appears that Collins & Co. were engaged in prosecuting the work which Sheldon and Collins had contracted to perform, but Collins & Co. may have been employed by Sheldon and Collins as subcontractors to run the tunnel, and indeed such seems to have been the fact. Sheldon not being in fact a member of that firm which executed the note sued on, is not liable on its contracts, unless he held himself out to the public as a member, and thereby induced third persons to deal with it. That he did so is not by any means established by the evidence. The payment of four dollars to Canty, the order for a stove given to the plaintiff, and the remark which the plaintiff says was made to him, *i. e.*, that Collins would do all the business and he (Sheldon) would agree to what was so done, are the only facts in the whole record tending to establish anything of the kind. They may tend to show that Sheldon held himself out as a partner in the firm of Collins & Co.; but he, in his testimony, denies having told the plaintiff that he would be responsible for what Collins did. On the contrary, he swears that he told plaintiff he had no interest in the mine, and would not be responsible for

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the debts of Collins & Co. The plaintiff's evidence, even uncontradicted, would hardly be sufficient to establish Sheldon's liability on the note; much less when explained away and contradicted by defendant Sheldon, in his testimony. In view of the weakness of the plaintiff's case, as made out by the evidence and the conflict in the testimony, this Court cannot reverse the order of the lower Court refusing a new trial.

In the bill of exceptions presented to this Court, the appellant complains of two rulings made by the Court below during the progress of the trial, and assigns them as error, each of which will be adverted to in their regular order. And first, it is claimed that the Court erred in allowing the defendant to read the deposition of S. W. Collins, counsel giving as a reason why it should not be placed in evidence that it was not taken by any person having the authority to take depositions. It seems, the deposition was taken in accordance with the following stipulation entered into between the counsel for the respective parties:

"It is hereby stipulated and agreed by and between the parties, plaintiff and defendants in this action, that the deposition of the defendant, S. W. Collins, be taken at the City of San Francisco, State of California, before F. J. Thibault, Notary Public, on the day of November, A.D. 1866, and hereby waive all preliminary notice, commission and other forms. The deposition to be used by either party on the trial."

F. J. Thibault, over his signature and official seal, certifies that the witness appeared before him in his office in San Francisco, on the eighth day of November, and made answers to the interrogatories propounded by the attorneys for the respective parties, which answers were properly returned to the Court where the action was pending.

The objection would have possessed more merit if counsel had not in the stipulation acknowledged Thibault to be a Notary Public, and had not agreed that he should take the deposition.

Were it not for the stipulation, plaintiff's counsel might perhaps have required further proofs of Thibault's authority to take the deposition, but the acknowledgment of his official character in the stipulation, and the agreement that the deposition should be taken

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before him, rendered any further proof of his authority unnecessary. It is not denied by counsel that it was taken by the very person agreed upon. Hence, to require further proof of his authority or official character would be superfluous; and indeed, the stipulation would effectually estop the parties to it from denying such authority. Even if Thibault were not a Notary Public, or an officer usually authorized to take depositions, yet the parties, having agreed that he should do so, should not be permitted to come into Court and at the last moment interpose the objection that he had no authority to do the act which the parties agreed he should do. Their stipulation is all the authority necessary in such a case; the deposition was therefore properly admitted.

How the proof that Sheldon was not a member of the firm of Collins & Co. tended to contradict or vary the written contracts between Fitch & Peck and Collins and Sheldon, it is impossible to understand. Those contracts certainly, do not mention the firm of Collins & Co., and there is not a syllable in them tending to show that Sheldon was a member of that copartnership. To prove that he was not would not then, it seems, vary or contradict the written instruments. This objection to the testimony of S. W. Collins was also utterly untenable.

Judgment affirmed.

Dissenting opinion by JOHNSON, J.

The foregoing opinion expresses my views of the law of this case, except in regard to the admission of Collins' deposition as evidence. Opposed to the views of a majority of the Court on this point, I think that the Court below should have excluded the deposition on one of the grounds of objection interposed by plaintiff's counsel: "That the official character which Thibault represented in taking the deposition was not properly authenticated." The recitals contained in his own certificate, the name and notarial seal appended to the deposition, is, as I conceive, the only evidence we have that he was by proper authority acting as a Notary Public when he performed this service. These of themselves were clearly insufficient for such a purpose; and unless it be, as claimed by respondent's counsel, and held by the other members of the Court, that the stip-

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ulation between the counsel dispenses with the necessity of such proof, or that such stipulation affords presumptive evidence that he was such Notary at the time stated, there can be no pretense of justification in allowing the deposition to be used as evidence. Therefore, the only question to be determined is the legal effect of the stipulation.

Let us first examine the statutory provisions bearing upon this matter. I shall refer only to such portions of the chapter as more directly affect this question.

Chapter VI, Laws of 1861, page 380, defines the authority and mode to be pursued in the taking of depositions without the State and to be used in our Courts.

Sec. 380 provides: "That such deposition shall be taken upon a commission issued from the Court under its seal, upon an order of the Court or Judge, upon five days' notice." The commission shall be issued to a person agreed upon by the parties; or, if they do not agree, it shall be issued to any *Judge or Justice of the Peace* selected by the officer granting the same, or to a *Commissioner of Deeds* appointed by the Governor."

Sec. 381 provides the manner of preparing and settling interrogatories, and "that the interrogatories shall be annexed to the commission;" also, "by agreement of parties the examination of witnesses may be had without interrogatories."

Sec. 282. "The commission shall authorize the commissioner to administer an oath, and to take his deposition in answer to the Court." In this instance a commission did not issue, but no objection to the deposition was made on this specific ground; and therefore I shall not consider at this time the effect of the omission, except so far as it may be necessarily involved in passing upon the question contained in this stipulation of counsel.

The stipulation reads as follows:

"It is hereby stipulated and agreed by and between the parties, plaintiff and defendants in this action, that the deposition of defendant S. W. Collins be taken at the City of San Francisco, in the State of California, before F. J. Thibault, Notary Public, on the — day of November, 1866, waiving hereby all preliminary notice, commission, and other forms. This deposition to be used by either party on said trial."

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Now, in considering the effect, meaning, and scope of this stipulation, we must not depart from certain well-defined and established rules applicable in such case. The mode of taking testimony by deposition is in derogation of the common law, and statutes which authorize such a proceeding and prescribe rules governing it must be strictly construed; and with equal strictness must be interpreted any agreement of parties which waives or varies any of these statutory requisites.

What then is the legal effect of this stipulation? First: it is agreed that the deposition, no day certain being named, may be taken in San Francisco, California, on *any* day in the month of November, 1866; and second, that although our statutes do not of themselves authorize a foreign notary to take a deposition, yet in this case the parties consent that F. J. Thibault, Notary Public, may perform this service. Furthermore, the parties *wave* certain acts which otherwise would be essential to the validity of the deposition. These are: first, the five days' notice of application for the commission; second, the issuance of the commission, including necessarily every matter proper to be inserted in such commission; and third, the form of the interrogatories. Certain it is that plaintiff's counsel have not expressly or directly consented that such deposition may be used on the trial without proper proof showing that Thibault was duly acting as a Notary when such deposition was taken.

Nor, as I interpret the agreement of the parties, is there any legal presumption fairly deducible from the instrument that, on the eighth of November, 1866, Thibault was authorized to act in any such official capacity.

The learned Judge of the Court below rests his decision of this point on these grounds: "By the stipulation of the parties to take the deposition of Collins 'before F. J. Thibault, Notary Public,' they are estopped from denying that Thibault was a Notary Public." "According to a strict construction of the stipulation, 'F. J. Thibault, Notary Public,' is merely *descriptio personæ*, and it is immaterial whether he was a Notary or not, so he was the party described in the stipulation, and so signed himself." "Parties can stipulate to take depositions before whomsoever they please, and it makes no

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difference whether they are authorized or not." And the same learned Judge thinks "that the objection might have had some weight if the stipulation was that the deposition should be taken before *any Notary Public in and for the City and County of San Francisco*," but concludes "that in such case it would be doubtful, as it is agreed by the stipulation that the deposition should *be used by either party on the trial*;" and I infer that these are the only grounds upon which respondents' counsel rely in support of the ruling of the Court below on this point, as their briefs upon which they submitted the appeal are silent respecting it.

In the first place, the learned Judge holds "that by the stipulation the plaintiff is estopped from denying that Thibault was a Notary Public," and this, of course, must refer to the *time* when the deposition was taken, to wit: the eighth of November, 1866—the stipulation being entered into on the third of the same month.

Allow that the parties did admit the official character of the person named, on the third of November; why are they estopped from denying, or rather from compelling, the adverse party to show such official character on the following eighth of the month? No expressed words contained in the stipulation have dispensed with this proof, nor can any legal intendment be in favor of an admission that such official relation continues for an unlimited or indefinite time. Any rule of construction governing an agreement of the parties, in respect to the official character of a commissioner authorized to take depositions, would equally apply to a regular commission issued by judicial order; and if the rule invoked by the learned Judge be correct, it must follow that in no case would the acts of the officer named in such commission require authentication, beyond his own signature, certificate and seal: a construction utterly opposed to the universal practice of Courts, except where the statute, as it does not in this State, makes the certificate and seal a sufficient authentication. The Judge further says: "According to a strict construction of the stipulation, 'F. J. Thibault, Notary Public,' is merely *descriptio personæ*, and it is immaterial whether he was a Notary or not, as he was the party described in the stipulation, and so signed himself." "Parties can stipulate to take depositions before whomsoever they please, and it makes no difference whether

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they are authorized to administer oaths or not." From this, it would seem he holds this to be an agreement that Thibault may perform this service as a private individual and not as a Notary Public. As I look upon this matter, such an interpretation is not warranted, either by strict construction or the most extended sense in which it can be regarded. It is unquestionably true that a private individual may, by consent of parties, take a deposition beyond the State; but such authority is derived from the express agreement of parties to the action. But when the authority is devolved upon a certain named person as an *officer*, and no express authority given him as an *individual*, assuredly he cannot for the time being lay aside his official character, and legal effect be given to his acts when performed by him as a private person. Such an act must be held as wholly unauthorized; nor could the act be considered differently in a case where, at the time the stipulation was made, the person named was exercising the duties of a particular office, but when the deposition was taken his authority as an officer had terminated. Hence it is that the fact, if disputed, must be shown; that he was properly acting in the capacity he represents at the time the act is done. For this purpose, as already stated, his own certificate and seal is not sufficient.

There seems, in the opinion of the Court below, some stress laid on that clause in the stipulation which provides "that the deposition should be used by either party on the trial." The learned Judge evidently overlooked this fact, that it was not the *uses* which might be made of a deposition taken in accordance with the stipulation, but the point controverted was that, in fact, there was no deposition which could be received as evidence in the case. This was the preliminary matter to be determined; and the functions which it was to perform, if any, depended wholly on the fact as to whether it could be at all considered as evidence in the case.

The evidence contained in the deposition of Collins is strongly in support of the defense set up in the answer, and undoubtedly this evidence exercised great, if not a controlling influence, in determining the finding of facts.

Under these circumstances, and for the reasons expressed in this opinion, I conclude that the Court below erred in disallowing plain-

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tiff's motion for a new trial on the one ground herein stated, and therefore dissent from the judgment of my associates.

Opinion by LEWIS, J., BEATTY, C. J., concurring, on petition for rehearing.

If the truth of the geometrical axiom, that "things which are equal to the same thing are also equal to each other," should be denied, no line of argument could perhaps be pursued which would more closely establish it than the simple statement of the fact. So, upon the question of partnership in this case, that no agreement between Collins and Sheldon and Peck and Fitch could impose the duties, liabilities, and responsibilities of a partnership upon Gross, Martin, and Richardson, who were utter strangers to such agreement, is almost a self-evident proposition. We will therefore leave that question with the consideration which was given to it in the original opinion of this Court.

Upon the second point made by counsel for appellant, we are equally well satisfied, not only that the conclusion arrived at by the majority of the Court is correct, but that it is also supported by an unbroken current of authorities, and the uniform practice of the Courts.

Counsel complain that the majority of the Court misconstrued the stipulation under which the deposition of Collins was taken, and claim that they did not admit Thibault to be a Notary Public, even at the time the stipulation was entered into, much less that he was so at the time the deposition was taken. To us, nothing seems clearer than that such admission is made by the stipulation.

But it is a matter of no consequence, so far as this case is concerned, whether such construction be placed upon it or not, for the certificate under the notarial seal is *prima facie* evidence of Thibault's official character, and further proof of that fact could only be required after such evidence was overcome by rebutting testimony.

It does not appear that appellant even attempted to prove that Thibault was not a Notary, but simply objected to the introduction of the deposition.

The certificate of an officer or commissioner taking a deposition

is uniformly received by all Courts as *prima facie* evidence of his official character. No rule of law is perhaps more familiar to the profession, or more frequently recognized by the Courts. In answer, therefore, to the assertion that to receive it as evidence of the commissioner's official character "would be opposed to the universal practice of the Courts," we simply refer to a few cases where without the authority of statute the certificate was so received. (*Dean v. Taggart*, 1 A. K. Marshall, 172; *Clements v. Durgin*, 5 Maine, 9; *Bullen v. Arnold*, 31 Maine, 583; *Nesse v. Smith*, 2 C. C. C. R. 31; *Price v. Morris*, 5 McLean, 4; *Patapsco Ins. Co. v. Southgate*, 5 Peters, 604; *Fowler v. Merrill*, 11 Howard, 375; *Ruggles v. Buckner*, 1 Paine, 358. See also 1 Greenleaf on Evidence, Sec. 323; 1 Hill, 249.)

The seal of a Notary Public, says Mr. Greenleaf, "is also judicially taken notice of by the Courts, he being an officer recognized by the whole commercial world." (Greenleaf, Sec. 5.) The seal of the Notary is evidence of his official character. (Chitty on Bills, 655. See also *Mott v. Smith*, 16 Cal. 533, and cases there cited; *Brown v. Philadelphia Bank*, 6 Sergeant & Rawle, 484.) This is an universally recognized rule, when the Notary acts within the sphere generally assigned to him by the law. In this case the authority to take the deposition is given by the stipulation of the parties, and *quoad hoc* such stipulation answers all the purposes of a statute giving the same authority.

Rehearing denied.

Dissenting opinion of JOHNSON, J.

No additional points are presented by appellant's counsel in their petition for a rehearing in this case, and after a reëxamination of the questions to be reviewed, I can discover no sufficient reason why I should not adhere to the views expressed by me in the former dissenting opinion, so far as they may apply to this appeal.

The point wherein I differ with the majority of the Court is now especially contained in that portion of the dissenting opinion as follows: "Opposed to the views of a majority of the Court on this point, I think that the Court below should have excluded the deposition on one of the grounds of objection interposed by plaintiff's

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counsel—that the official character which Thibault represented in taking the deposition was not properly authenticated. The recitals contained in his own certificate, the name and notarial seal appended to the deposition, is, as I conceive, the only evidence we have that he was by proper authority acting as a Notary Public when he performed this service. These of themselves were clearly insufficient for such a purpose.” Furthermore, “that to receive such certificate, seal, and signature, without further authentication, would be a construction utterly opposed to the universal practice of Courts, except where the statute, as it does not in this State, makes the certificate and seal a sufficient authentication.”

Let us ascertain how far this proposition is overthrown by the authorities cited. (*Dean v. Taggart*, 1 A. K. Marshall, 172.) One of the grounds of objection to the deposition (it being taken out of the State) was “that the persons before whom it was taken were not shown to be Justices of the Peace.” The Court says: “We are perfectly satisfied that the certificate of the persons before whom the deposition was taken sufficiently shows them to be Justices of the Peace. It does not, it is true, expressly state them to be Justices of the Peace, but as by the caption of the deposition it purports to be taken by persons to whom a *dedimus* had been issued for that purpose; and as by the *dedimus* those persons taking the deposition are described to be Justices of the Peace, there cannot be a doubt but that these circumstances, under the Act of this county [evidently intending State] for that purpose, are sufficient to show that the persons by whom the deposition is certified to have been taken are Justices of the Peace.”

The objection which was passed upon by the Court in that case was not that the certificate of the Justices officiating would be insufficient to show their official character; but it would seem from the opinion that by the law of that State such certificate was made sufficient without other proof, and the Court merely held that the absence of an express averment showing the fact of their official character was supplied by matter contained in the *dedimus* and the caption of the deposition.

In 5 Maine, (Greenleaf) *Clement v. Durgin*, 9, the question was “whether a deposition taken under a commission by a person

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styling himself as a Judge of the St. Lawrence Court of Common Pleas, in the State of New York, which was objected to by the counsel for the complainant, could be received without proof of the official character of the Judge." In that State, by Chapter 85 of the revised laws, prescribing the mode of taking depositions, Sec. 6, which in this particular the Court says "is a reënactment of the old law," it is provided "that all depositions taken out of this State, before any Justice of the Peace, public notary, or other person legally empowered to take depositions in the State or county where such deposition shall be taken and certified, may be admitted as evidence in any civil action, or rejected at the discretion of the Court." The Court, in pursuance of this statute, adopted a rule to the effect "that in all cases of depositions taken out of the State without commission, it shall be incumbent on the party producing such deposition to prove that it was taken and certified by a person legally empowered thereto;" "thereby," says the Court, "plainly implying that no such evidence would be required in the case of depositions taken under commission." And the Court held that under these circumstances the deposition was properly admitted in evidence.

In *Bullen v. Arnold*, 31 Maine, 588, there is nothing in the report of the case showing whether the deposition was taken within or without the State. The opinion of the Court was delivered orally, and the statement of the case is altogether too meagre to entitle it to any considerable weight as authority under any circumstances. The decision of the Court clearly related to the question presented by the facts before it; and without an understanding of these facts it cannot properly be claimed as authority in support of the more general proposition. A later case than either of those referred to, decided by the Appellate Court of that State, furnishes in some measure an explanation of the grounds of the decision in the case last cited.

In *Palmer v. Fogg*, 35 Maine, 368, depositions purporting to have been taken before a Commissioner in Wisconsin, appointed by the Governor of Maine, were objected to by defendant's counsel—claiming "that it was incumbent on the plaintiffs to prove that they were taken and certified by a person legally empowered," etc.

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The Court, in response, says: "By the Revised Statutes, Chapter 134, such commissioners and their official acts are placed upon the same footing with Justices of the Peace and their official acts within this State. Hence, authentication *aliunde* is not required." And cites in support of its ruling the case as above (*Bullen v. Arnold*). So that it would appear to have been understood by the Court that the official act questioned in 31 Maine, 583, was performed by a magistrate of that State.

In 1 Hill, 249, (*Williams v. Eldridge*) a commission to take the deposition of a witness in Canada was issued by one of the New York Courts, directed to certain commissioners by name, one of whom was Solomon Y. Chesley. Upon return of the deposition, signed by S. Y. Chesley, it was objected to for the reason "that it should have been attested by his first name at length." The Court on appeal held "that commissioners under the Act are *quoad hoc* officers of the Court. Their return of evidence is, in effect, like any office copy made by the Clerk of the very Court to which he belongs. The Court, knowing the real name of its officer, is every day in the habit of recognizing his signature as valid, though his first name be denoted only by initials." I am at a loss to discover any analogy between the points made in that case and the one before us. Nor can I perceive wherein a single expression contained in the opinion of the learned Judge militates against the position contended for here.

In 5 Peters, 604, (*The Patapsco Insurance Co. v. Southgate et al.*) the only point decided having any bearing on this question is sufficiently stated in the syllabus of the case as reported.

"In the caption of a deposition, taken before the Mayor of Norfolk, to be used in a cause depending, and afterwards tried in the Circuit Court of the United States held in Baltimore, the Mayor stated the witness 'to be a resident in Norfolk;' and in his certificate he states that the reason for taking the deposition is 'that the witness lives at a greater distance than one hundred miles from the place of trial, to wit: in the borough of Norfolk.' It was sufficiently shown by the certificate, at least *prima facie*, that the witness lived at a greater distance than one hundred miles from the place of trial."

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The Court furthermore says: "This was a fact proper for inquiry by the officer who took the deposition, and he has certified that such is the residence of the witness." Also cites the case of *Bell v. Morrison*, 1 Peters, 356, as deciding "that the certificate of the magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury."

The decision of the United States Court in both these cases turns upon a construction given to the Act of Congress of the fourth of September, 1789, chapter twenty, under the authority of which the deposition purported to have been taken, in reference to which the Court (1 Peters, 355) says: "The authority to take testimony in this manner, being in derogation of the rules of the common law; has always been construed strictly, and therefore it is necessary to establish that all the requisites of the law have been complied with, before such testimony is admissible."

The Act of Congress referred to provides "that every person deposing as aforesaid shall be carefully examined, and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the deposition so taken shall be retained by such magistrate until he deliver the same with his own hand into the Court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any was given to the adverse party, be by him, the said magistrate, sealed up and directed to such Court, and remain under his seal until opened in Court."

The Court then proceeds: "Without doubt, the certificate of the magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury if all the necessary facts are there sufficiently disclosed. It is not denied that the reducing the deposition to writing in the presence of the magistrate is a fact made material by the statute, and that proof of it is a necessary preliminary to the right of introducing it at the trial. But it is supposed that sufficient may be gathered by intendment from the certificate of the magistrate to justify the presumption that it was done. The certificate was in these words: 'State of Ten-

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nessee, Dickson County, ss. At Charlotte, in said county, on the fourth day of July, 1822, before me, James M. Ross, Justice of the Peace and one of the Judges of the County Court of Dickson County, came personally John Mockbee, being about the age of fifty-one years, and after being carefully examined, and cautioned and sworn to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing by him in his own proper hand.' The certificate then proceeds to state the reason for taking the deposition, etc., in the usual form. It is remarkable that the certificate follows throughout, with great exactness of terms, every requisition in the statute, with the exception as to the deposition being reduced to writing in the presence of the magistrate, and it is scarcely presumable that this was accidentally omitted. At all events, every word in the certificate may be perfectly true, and yet the deposition may not have been reduced to writing in the magistrate's presence. If this be so, then there can arise no just presumption in favor of it. And we think, in a case of this nature, where evidence is sought to be admitted contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken. There ought to be direct proof that the requisitions of the statute have been fully complied with. We are therefore of opinion that the deposition was properly rejected."

In 11 Howard, 375, *Fowler v. Merrill*, the Court disposes of the objection made to a deposition on the authority of these two cases, and furthermore holds that a Probate Judge is a County Judge within the description of the law. 1 Greenleaf on Evidence, Sec. 323, is also referred to as authority on this point. I cannot perceive that the text lays down any broader rule than is furnished by these three decisions of the Supreme Court; indeed, the author's notes refer to the case in 1st Peters in support of the text, and states the rules in precisely the same language: "That the magistrate's certificate will be good evidence of all the facts therein stated, so as to entitle the deposition to be read, if the necessary facts are therein sufficiently disclosed." Certainly there is nothing in this to authorize us to extend the rule to other incidental facts, but which are equally essential to the validity of evi-

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dence presented in such form: such for instance as the point now being considered, of proving the official character of the Notary who took this deposition. This preliminary fact being established by proper proof, then the certificate of the officer becomes evidence, at least *prima facie*, that the statutory requirements have been observed, if the necessary facts are disclosed in the certificate. In my judgment these authorities go no further.

The other authorities cited—2 C. C. R., 5 McLean, and 1 Paine—are not contained in our libraries, and as to the controlling facts upon which these decisions are founded, the only knowledge we have is such as can be gathered from the Digest; and I can see nothing contained in the synopsis of such cases that in any manner distinguishes them from the rule already stated from the Supreme Court decisions.

Both in this and the former dissenting opinion, in stating what I conceived to be the proper rule, I must be understood as applying it to the facts shown in the case now before us. I do not propose at this time to extend the inquiry further, or suggest what should be held sufficient proof of authorized or official character of the person taking a deposition, if the circumstances were different. It undoubtedly has in some instances been held, that when a deposition has been taken pursuant to a commission issued by judicial authority, the Court will regard the certificate of the commissioner to that effect as sufficient proof of identity, treating the act as done by an officer of the Court. Another exceptional case would probably be, where the party objecting was present when the deposition was taken. And the class of exceptions might be further extended to the uttermost limits which precedent has gone, and yet, as I believe, in no respect conflict with the rule insisted upon in this instance.

The statute in force in this State regulating the manner of taking depositions out of the State provides but the one method, to wit: the issuance of a commission by the authority of the Court or a Judge. A Notary is not one of the officers named to which a commission can be issued, although the parties may agree upon the person to whom it may be issued; and giving to the foregoing decisions all the force which is claimed for them, it would simply

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amount to this, that if a commission had been issued by proper authority to take the deposition of Collins, the person so agreed upon as commissioner, or otherwise, the officer designated in the commission might by his own certificate authenticate his official action. Such a case is not before us.

It is not necessary to again refer to the terms of the agreement made by counsel. It is shown that no commission was issued, and the officer who took the deposition is not empowered so to do by our statute, and therefore, according to my understanding, it falls not within either the letter or spirit of any rule which is recognized by any of the foregoing authorities.

Let us briefly refer to some other decisions affecting this question, after having considered the statutory provisions bearing upon it. The officers who are authorized by our laws to take depositions out of the State are "Judges, Justices of the Peace, and Commissioners of Deeds appointed by the Governor of this State." We have no statute which makes a certificate under the signature and seal, or either, of a Judge or Justice, in such a proceeding, sufficient authentication of official character; but on the contrary, the law does provide that an official act performed by a Commissioner of Deeds may be shown by the certificate and seal of such Commissioner. (Acts 1864-5, 130; Territorial Acts, 1864, 47.)

Under the authority of *Clement v. Durgin*, 5 Maine, 9, before cited, the signature and seal of any officer except a Commissioner of Deeds would be rejected as even *prima facie* proof of their official character; the statute here, like a rule of court in Maine, having confined such mode of authentication to a specified class of officers.

The Revised Statutes of Connecticut, p. 89, Sec. 115, provides that "depositions may be taken in any other State or county by a Notary Public, Commissioner appointed by the Governor of this State, or any magistrate having power to administer oaths, and the witness * * * shall subscribe his deposition and make oath to it before such authority, who shall attest the same, and certify that the adverse party or his agent was present, (if so) or that he was notified; and shall also certify the reason of taking such deposition,

shall seal it up, direct it to the Court where it is to be used, and deliver it if desired to the party at whose request it was taken."

The reference notes to this section cite *Thompson v. Stewart*, 3 Conn. R. 171, wherein a deposition taken in another State was accompanied by a certificate of the County Clerk, authenticated under the seal of the county that such person was a Justice of the Peace, was held sufficient.

In *Allen v. Perkins*, 17 Pickering, 369, objections were made to a deposition taken before Searle, a Justice of the Peace in Rhode Island, unless the fact that Searle was at the time a Justice of the Peace should be proved by the record of his appointment and qualification. But it was ruled that "it might be proved by evidence that he was at the time acting in the capacity, and in fact exercising the office of Justice of the Peace." The Court say: "Here it was proved to the satisfaction of the Court, that the Justice taking the deposition was an acting Justice of the Peace. This kind of proof has always been held good *prima facie* evidence of the appointment and qualification of a magistrate so as to authorize him to take depositions." In this case the deposition appears to have been taken without a commission—merely upon notice. In *Adams v. Graves*, 18 Pick. 355, it was held "that by a rule of court where a deposition is taken under a commission directed to any Justice, etc., the certificate of execution on the return of such commission by a person professing to act as such magistrate shall be *prima facie* evidence of his official character, and the burden of proof shall lie on the objecting party."

The inference to be derived from these decisions is, that the statutes of that State were silent in respect to the authentication necessary in such cases, and the Court by rule supplied the omission in part by providing that when a deposition was taken in conformity with a commission, the certificate of the magistrate was to be deemed *prima facie* evidence of his official character; whereas proof *aliunde* such certificate was requisite when the deposition was taken merely upon notice.

In New Hampshire, (see *Shepherd v. Thompson*, 4 N. H. 215) it seems the Court by rule prescribed that "the Clerk of the Court in the county where the action is pending may issue a commission

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to take depositions in the vacation, which commission shall be directed to any Justice of the Peace, Notary Public, or other officer legally empowered to take depositions or affidavits in the State or County where the deposition is to be taken."

A deposition taken in New York, by commission, under the aforesaid rule, was objected to because "it did not appear that the person who took the deposition had any authority to take depositions, or that he was a Justice of the Peace or Notary Public." The Court said: "We think this objection is well founded. It has always been the uniform practice of the Court to require evidence that the person who took the deposition was duly qualified, whether it were taken under our statute or under a commission. Slight evidence has often been deemed sufficient, but no deposition taken abroad has ever been received, unless by consent of the opposite party, without such proof."

The same Court (opinion by Parker, J.) in *Dunlap v. Waldo*, 6 N. H. 450, had further occasion to consider the question as to the measure of evidence necessary to show the official character of the officer taking a deposition in another State. A deposition was taken before a Justice of the Peace in Madison County, New York, and to show that "Chapman, before whom it was taken, was a Justice," a certificate was offered, purporting to be "signed by the Clerk of said Madison County, and to have the seal of the county affixed to it; that Chapman was, at the time of taking said deposition, one of the Justices of the Peace for said county, duly elected and qualified; and that the Clerk was acquainted with his handwriting, and believed the signature to the caption to be his proper handwriting and signature."

The deposition was received, and upon appeal the Court says: "In holding that the certificate of the County Clerk is competent evidence of such appointment, we do not mean to be understood that other evidence is to be excluded. Evidence that the individual is an acting magistrate has uniformly been held to be sufficient *prima facie* for such purpose."

Again, in the case of the *State v. Stone*, 12 N. H. 90, the same Court distinctly approves of the rulings in the last two cases, and reaffirms the construction given to the rule. The rule of court

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commented on in these cases, it will be noted, did not prescribe what form of evidence was necessary to show the official character of the officer; but in this particular it stands on an equal footing with our statutes. Under these authorities, the certificate of Thibault would be clearly insufficient.

In Louisiana (14 La. Ar. 795) it was held that "the capacity and signature of a Justice of the Peace, who has taken a deposition under a commission in another State, must be established by the certificate of the Governor, under the great seal of the State." (20 U. S. Digest, 363, Sec. 35.)

In Vermont (1 Chip. 176) the Court ruled that "a deposition taken by a Notary Public in another State does not authenticate itself." (2 U. S. Digest, 210, Sec. 57.)

In Illinois (2 Scam. 348) it is stated that "if a commission to take depositions in another State is not directed to commissioners, and the depositions are taken by a Justice of the Peace, his official character should be certified under the seal of a Court of Record, or the great seal of the State where the depositions are taken." (4 U. S. Digest, 660, Sec. 12.)

A similar rule prevails in Indiana with reference to affidavits. (*Hagaman v. Stafford*, 2 Blackf. 176; *Doughton v. Tillay*, 4 Blackf. 433.) Also, respecting an answer to a bill of discovery as evidence, *Id.* "The manner of authenticating depositions in the last named State is regulated by statute, and the authorities which in given cases recognize a certificate of the officers to be sufficient proof are within the terms of the statute. (See 2 Indiana Revised Statutes, Secs. 260-1.)

And so far as we have the facilities at our command for ascertaining the facts, it will be seen, with scarce an exception, that wherever it has been held that a certificate or seal proves itself for the purposes stated, such holding is in pursuance of the express commands of the statute or a rule of the Court.

The points considered in each of the foregoing cases involved the proceedings of officers who, by force of the law, were empowered to take depositions. Notaries Public not being within the description, the same presumptions of law do not attach to their official acts. In treating of certificates as evidence, (1 Starkie on Evi-

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dence, 382) it is stated that "a protest as to the presentment and nonacceptance of a foreign bill of exchange, attested by a Notary Public, is evidence of those facts in an action upon a bill. This is a relaxation of the strict rule from a principle of great convenience." The doctrine of the text is illustrated by numerous authorities referred to in the notes; and that the effect of such a certificate as evidence is limited to this, the one matter, (except when enlarged by statute) is abundantly shown by the same authorities. On this point, in Louisiana, (*Phillips v. Flint*, 3 Mill's Lou. Rep. 146, 149) it is said: "These notarial acts may be considered as an exception to the general rule that the acts of a person assuming power of an officer of a foreign State—when contested in a Court of justice—can have no weight until his capacity be proven." To the same purport has it been held in Pennsylvania, (10 Sergeant & Ball, 160) also in Maryland, (3 Harr. & John. 71, 74) and the annotator concludes, that "a Notary's certificate is in general only evidence of such acts as he does under the *lex mercatoria*, has been recognized in several cases." (Part 2, Cowen & Hill's Notes, 1,053.)

Since writing the foregoing, my attention has been called to an additional clause embodied in the prevailing opinion in this case. It is true, in 1 Greenleaf, Sec. 5, p. 7, the rule is thus broadly stated, that "the seal of a Notary Public is also judicially taken notice of by the Courts, he being an officer recognized by the whole commercial world." But when we weigh the language, in connection with the context in which it occurs, and more especially observe the points embraced in the decision referred to by the accompanying notes, it cannot be doubted that the rule, as stated in the text, was designed to apply only to the official acts of such officer falling within the range of the *lex mercatoria*. This inference is strengthened by Sec. 183, p. 197, second volume of the same work, where the subject matter is more fully considered. And here I hesitate not to add, that the general terms in which the rule is stated in the section first quoted, is but one of the many instances found in this treatise, which, if accepted in its literal and unqualified sense, would differ widely from the prescriptions of the law, as given us by the most eminent jurists; thus serving oftentimes to mislead the inquirer

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concerning questions of the first importance. These defects, which in so great a degree detract from its general merit and usefulness, are so well understood by the legal profession and the Courts as to render unnecessary any extended criticism.

In Chitty on Bills, 655, the rule there stated relates to protests only; and the case referred to in the accompanying notes of the same work are of similar character.

The case in 6 Serg. & Rawle is alluded to. By an Act of the Pennsylvania Legislature, second January, 1815, "the official acts, protests, and attestations of Notaries Public, certified according to law, under their respective hands and seals of office, may be received as evidence, provided any party may contradict by other evidence any such certificate." Under a construction of this Act, in the case referred to, (*Brown v. Philadelphia Bank*, 6 Serg. & Rawle, 484) the question arising from a protest of commercial paper, by a Notary acting under authority of that commonwealth, the Court held that "notice to the indorser of the nonpayment of a promissory note is an official act, and the protest is *prima facie* evidence thereof," and "the certificate of the Notary under such seal is *prima facie* evidence that such person is a Notary Public."

The authority of *Mott v. Smith*, 16 Cal. 533, I cannot perceive in any respect affects the question under discussion. One of the points made in that case was, that "the Court below erred in admitting a deed in evidence, when the only proof of its execution was the certificate of acknowledgment of Albert B. Bates, principal Notary Public of the Hawaiian Islands, and George A. Lathrop, United States Vice-Consul for Honolulu, Hawaiian Islands. On appeal the ruling of the lower Court was sustained, and I do not propose to question either the reasoning or conclusions of the learned Judge [Field] who therein pronounced the opinion of the Court. But we must not confound a question, decided upon a construction of the statute regulating *conveyances*, with the totally different one, governed by the provisions of our civil code, in respect to depositions. In the California Act, to which in certain particulars a construction was given in the case last cited, Secs. 4, 29, and 31, are in all respects identical with ours. (See new Act concerning Conveyances, Statutes 1861, p. 11.) Says the Court, (page 552)

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in the case of *Mott v. Smith*, "the fourth section of the Act of April 16th, 1850, concerning Conveyances, specifies the officers by whom the proof or acknowledgment of any conveyance affecting real estate may be taken, and provides that when the conveyance is acknowledged or proved without the United States, it may be taken by any 'Judge or Clerk of any Court of any State, kingdom or empire having a seal, or by any Notary Public therein, or by any Minister, Commissioner, or Consul of the United States appointed to reside therein.' The twenty-ninth section of the Act provides that 'every conveyance or other instrument conveying or affecting real estate, which shall be acknowledged or proved and certified as hereinafter prescribed, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof.' And the thirty-first section declares that 'neither the acknowledgment, nor the proof of any such conveyance or instrument, nor the record, nor the transcript of the record of such conveyance or instrument, shall be conclusive, but the same may be rebutted.'

"The word 'hereafter,' says the distinguished jurist, "in the twenty-ninth section, is evidently a misprint or a mistake in the enrollment of the Act for 'herein,' as the provisions to which it refers precede the section."

On a construction of this statute, the Court holds that "the certificates were *prima facie* evidence of the official character of the persons by whom they were given." And I cannot see how it could have been decided otherwise, when the statute distinctly makes the certificate, primarily, evidence of the facts stated therein, which are connected with such acknowledgment, but liable to be rebutted by opposing evidence. This is all, so far as I can see, that the Court assumed to decide in that case; and if any casual expression contained in the opinion warrants a more extended construction, it is mere *obiter*, as the point presented to the Court was simply "whether or not the certificates of the officers named were *prima facie* sufficient, under the statute, to entitle the conveyance to be admitted in evidence." Inasmuch, therefore, as the conclusion of the Court depended upon a construction of the statute, it would naturally follow that the authorities cited in support of its ruling were also governed by the statutes of the respective States

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in which the question arose ; and indeed, such is true with respect to all of the cases referred to, so far as I have the means of ascertaining. Some of them I have already noticed in a former part of this opinion. In these, as well as in *Freeman v. Cameron*, 24 Wend. 87 ; *Morris v. Wadsworth*, 17 Id. 103 ; *St. John v. Croel*, 5 Hill, 574 ; and *Livingston v. McDonald*, 9 Ohio, 169, the questions raised which are at all pertinent here, rested upon the certificates of acknowledgment appended to the conveyance and the statute there passed upon, and are not materially different in the one particular—that is, as to the effect of the certificate as evidence—from the law as defined both here and in California. And if this were an inquiry growing out of the statute concerning conveyances, I should not hesitate to pronounce a notarial certificate possessing the statutory requisites as a sufficient *prima facie* showing of official character. But does this excuse, much less justify, the absence of other proof in a totally different matter, and allow the same credibility to be given it when it is seen that the statute in relation to depositions has not, as in the former instance, provided that “the certificate may be read in evidence without further proof?”

The simple statement of the proposition carries with it its own refutation. Hence I conclude that the authorities last considered, if they have any possible bearing upon the question at issue, only present in a more forcible light the correctness of the rule I have urged in this case ; and for a reason before stated in a somewhat different form, that “as the statute does in express terms impart to a notarial certificate in a given case the force of *prima facie* evidence, the legal presumption arises that such effect of the certificate must be confined to the particular thing expressed.” This, of course, subject to the exceptions covered by the law merchant. In response to the suggestions contained in the last paragraph of the opinion of my associate, I will merely say this: the question of authority to take the deposition is one thing, the evidence of the execution of that authority is another. So far as the acknowledgment of conveyance is concerned, the statute is the Notary's authority ; whilst in the deposition taken in this case this authority is contained in the agreement of the parties. But here the analogy between the two cases ends ; because in the former instance, the

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statute waives other proof as to official character for the time being; at least, by declaring the officer's certificate *prima facie* evidence; whereas in respect to the depositions the parties have not consented to such waiver, nor has the statute done so, as in the other case.

No such legal effect is given to the certificate as in the matter of conveyances.

It is desirable at all times to observe the rules of construction most generally recognized by the highest Courts of other States, under similar circumstances; and it seems to me after a somewhat careful examination of decisions within our reach, that at least the weight of authority is opposed to the ruling made in the Court below, in receiving the deposition as evidence, under the attending circumstances. I am therefore compelled to dissent from the conclusion of my brother Judges, so far as it concerns the one point herein discussed.

HORACE M. WHITMORE, APPELLANT, v. N. SHIVERICK,
ET. AL., RESPONDENTS.

When there is a statement on appeal from the judgment, and subsequently a statement on appeal from an order overruling a motion for a new trial, each statement must be considered separately, and portions of one cannot be taken to aid the other.

It would be error to grant a new trial where there is no affidavit and no statement in support of the motion for that object.

A statement on appeal must be made within twenty days after judgment, and if a sufficient statement be not made within that time it cannot be subsequently made.

This Court will not reverse a judgment because the verdict or finding of facts is not sustained by the evidence, unless the appellant has made his motion and statement on motion for a new trial in the Court below.

"Copartnership property and assets" is joint property, within the meaning of that term as used in Section 32 of the Civil Practice Act.

Partners are *quasi* joint tenants, the survivor having a peculiar, qualified survivorship.

A partner cannot sell his interest in partnership property so as to deprive his copartners of their lien thereon for partnership liabilities. Nor can a mortgage executed by one partner have such effect.

Where A, B, C and D are sued as partners doing business under the name of A & Co., the summons is served on A only, and under our statutory provisions

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judgment is taken upon default against A, and against the joint property of A & Co. This judgment is not defective as against the property of A & Co., because it turns out that the firm was composed of only A, B & C.

A judgment against the joint property of A & Co. would not affect the interests of D if he was not a member of that company.

UPON REHEARING.—The object of Sec. 32 of the Practice Act was to make the property of all partnership associations and joint associations liable on judgments obtained upon service of one member of the association.

A trifling variation between *allegata* and *probata* is not material where the facts constituting a proper defense are substantially stated.

Under the provisions of Sec. 32, one partner who is served must answer for all the partners or joint debtors who are sued, so far as the partnership or joint property is concerned.

When a party makes his defense to an action upon the ground that he acquired the property in controversy under an execution against A & Co., and in stating who composed that firm includes the name of one party who was not a member of the company, this is an immaterial variance.

As the law stood when this judgment was rendered, a firm or joint stock company could not be sued by the company name. But the suit being brought in the ordinary form, the judgment might go against one or more of the associates who were served with summons, and a sort of judgment *in rem* against the joint property of the association.

Partners may acquire property as joint tenants or as tenants in common; but whatever may be the technical terms of the deed, courts of equity will treat it as partnership property, or in other words, a personal property, wherever it has been acquired with partnership funds for partnership purposes.

Partners are joint tenants of personal property, with only a qualified right of survivorship, and in equity they stand in the same relation in regard to real estate.

When a finding of facts is defective, it must be excepted to in the Court below, or this Court will not reverse the case for such defect.

APPEAL from the District Court of the Second Judicial District, Ormsby County, Hon. S. H. WRIGHT, presiding.

The facts are fully stated in the opinion of the Court.

G. A. Nourse, for Appellant.

The statute does not require a statement on appeal to be served on the opposite side. It only has to be filed within twenty days. The judgment having been entered on the seventh, and the statement filed December 27th, was in time. (*Judd v. Fulton*, 10 Barb. 117; *People v. N. Y. Central R. R. Co.*, 28 Barb. 284.)

The statement on appeal from the order was made on the fourteenth day of after order, and clearly within time.

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Respondents *filed* certain proposed amendments to the statement on appeal from the order overruling motion for new trial, but did not serve them. Not being served, they are under the statute a mere nullity, and the original statement must be considered agreed to. There were no amendments either served or filed, as to the other statement, and that also must be considered as agreed to.

The California statute differing widely from ours, their decisions quoted by respondent on this subject are not applicable.

The statement on appeal from the order overruling the motion for new trial sets out the errors relied on, and shows the statement on appeal contains "all the evidence" necessary to explain these grounds. The statement also shows that all the testimony contained in or referred to in said statement was used on the motion for a new trial.

If it appears all the testimony in regard to the errors complained of is before the Court, it is not all important that all the testimony in the case should be before this Court.

The motion to dismiss the appeal because of any supposed defect in statement is simply absurd. A party may appeal without any statement.

All the testimony contained in the statement on appeal might have come before the Court on motion for new trial, without statement, for it is all documentary.

The Court erred in finding the property in controversy the partnership property of Sperry & Co. The only evidence in the record in relation to the ownership of the property, is contained in the deed from Henning, J. A. Sperry and Nathaniel Shiverick, and the articles of copartnership between them. The deed makes them tenants in common, and the articles of copartnership do not vary these relations.

It is only where there is an agreement between the parties to that effect, that real estate used for partnership purposes becomes, even in equity, partnership property. (*Smith v. Jackson*, 2 Edw. 28; *McDermott v. Lawrence*, 7 S. and R. 438-441; *Sigourney v. Munn*, 7 Conn. 11, 20; *Frink v. Branch*, 16 Conn. 261, 270.)

Even if specified agreement be not necessary, it is conceded on all hands without a single case to the contrary, that real estate so

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held by conveyance to the several parties, is not to be treated as partnership property at law or in equity, *unless purchased with partnership funds*. (1 Story Eq. Jurisp. Sec. 674; *Blake v. Nutter*, 19 Maine, 16; *Goodwin v. Richardson*, 11 Mass. 469; Collyer on Partnership, Sec. 135, citing *Dyer v. Clark*, 5 Metcalf, 562; *Howard v. Priest*, 5 Id. 582; *Sigourney v. Munn*, 7 Conn. 11; *Donaldson v. Cape Fear Bank*, 1 Dev. Eq. 103; *Pearce v. Trigg*, 10 Leigh [Va.] 406, *et al.*)

The mere fact that the property held by the members of the firm as tenants in common is used in and for the partnership business, or a mere agreement to use it for partnership purposes, is not itself sufficient to convert it into partnership stock. There must be some evidence of further agreement to make it partnership property. (*Brooke v. Washington*, 8 Grattan, 256; *Frink v. Branch*, 16 Conn. 262.)

Even were the mortgaged premises partnership property in equity, still the grantors of defendant Frothingham acquired no title by their purchase at sheriff's sale, save of the undivided half held by Sperry as tenant in common with Shiverick.

Even if Sperry and Shiverick held the premises under their deed from Henning as partnership property, the legal title was not in the partnership as such.

Under all these decisions, the grantors in such case would take the legal title as tenants in common, and hold *in trust* for the partnership. (3 Kent's Com. 37; Collyer on Partnership, Sec. 135, citing *Dyer v. Clark*, 5 Metcalf, 562; *Howard v. Priest*, 582-585; *Burnside v. Merrick*, 4 Metcalf, 527; *Hoxie v. Carr*, 1 Sumner, 173, 182, 183.)

Under our statute the legal title is all that could be reached by the execution relied upon, issued upon judgments in actions against the firm of Sperry & Co., alleged in the answer to have been composed of Sperry, Shiverick, E. P. Whitmore, and one Thomas McFarland. The summons was served on Sperry alone; the judgment could only be enforceable against his "separate property" and the "joint property of all" the defendants in that action. (Sec. 32 of Practice Act.)

The Court below finds the firm of Sperry & Co. composed at

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that time, of one person less than the firm sued in the action brought by Ruhling & Co. and Hickok & Co.

How could property, which the Court below finds in this action to have belonged to a firm composed of Sperry, Shiverick and McFarland at the time of the sale on execution under which defendant Frothingham claims, pass by such sale as the joint property of Sperry, Shiverick, McFarland, and *E. P. Whitmore*, all of whom were the defendants in the action in which the execution issued on which said sale was made?

If said mortgaged premises were not "the joint property of all" the four defendants in said action, only the separate property of the defendant served [Sperry] could, under our statute, have passed by the sale.

In such case a conveyance by the parties holding the legal title to a *bona fide* purchaser or incumbrancer for a valuable consideration, without notice of partnership rights in the case, is valid. (Collyer on Partnership, Sec. 135, closing sentence; *Hoxie v. Carr*, 1 Sumner, 182-183; *Dyer v. Clark*, 5 Metcalf, 562; *McAllister v. Montgomery*, 3 Hayw. 96; *Coles v. Coles*, 15 Johns. 161; *McDermott v. Lawrence*, 7 S. and R. 488; *Ford v. Herron*, 4 Mumf. 316; *Frink v. Branch*, 16 Conn. 261, 271; *Buchan v. Sumner*, 2 Barb. Ch. 168, 198.)

Even if the partnership of Sperry & Co. held the equitable title to this property on execution, a common law judgment could not reach it. Such execution could only reach the legal estate of the party served. If it was desired to reach the equitable title of other members of the firm, a proper equitable proceeding should have been instituted; the execution at law only released Sperry's interest.

Even if this property was partnership property capable of passing under execution against Sperry & Co., still Shiverick's interest in this case did not pass, because he had, before the sale or levy, made a *bona fide* sale of his interest to a third party.

Nor is it material to show that the mortgages in question were recorded before the attachment was levied in the action against Sperry & Co.

A judgment creditor does not stand in the same position as a purchaser for a valuable consideration. The latter upon recording his conveyance, takes precedence as a prior purchaser of whose deed he has no *actual* notice unless the same be recorded. The former simply steps into the shoes of the judgment debtor by his purchase on execution. As an unrecorded deed is valid against the grantor, so it is against the purchaser on execution against such grantor. He simply takes such title as the judgment debtor has—no more. (Laws of 1861, p. 14, Secs. 25 and 26.)

There is no evidence to support the finding that the mortgagees took their mortgage with notice, nor could such evidence have been legally received, for there is no such allegation in the complaint.

C. J. Hillyer, for Respondent, makes the following points :

First. The record contains no statement on motion for new trial. The right to move was therefore waived, and the order denying the motion was correct. (Practice Act, Sec. 195 ; 2 Cal. 307 ; 3 Id. 89 ; 9 Id. 247 ; 12 Id. 425 ; Id. 492.)

Second. What purports to be a statement on appeal from the order denying motion for new trial, cannot be used for any purpose.

1st. It is neither agreed to nor settled by the Judge. The statement was filed January 19th. Amendment to the statement was filed January 23d. No settlement was ever had or asked for. It is therefore a nullity. (Practice Act, Secs. 276-7-9 ; 4 Cal. 284 ; Id. 215 ; Id. 244 ; 12 Id. 280 ; Id. 425 and 492 ; 13 Id. 170 ; 16 Id. 185 ; 20 Id. 177 ; see *Levy v. Fargo*, 1 Nev. 416.)

2d. Even if agreed to or certified, it is totally insufficient to enable the Court to review a decision upon the motion for new trial.

An appeal from an order brings up for revision the action of the Court below in granting or refusing the same, and that alone. The Appellate Court must decide the same question, and decide it upon the *same evidence* as the Inferior Court.

It is not authorized to decide whether or not the party was in fact entitled to a new trial, but whether the lower Court, upon the basis presented to it for its action, erred in its decision.

This can only be determined when the Appellate Court has placed before it in proper form the inducements to the action of the Court below.

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The two tribunals must act on precisely the same premises, or otherwise they might draw different conclusions, and each be correct. For this reason, it is not necessary to make a statement on appeal from an order on motion for new trial. All that is necessary is a proper certificate to the statements or affidavit used on the hearing of the motion in the District Court. When made upon the ground that the evidence does not justify the findings, it must be done by statement. The statement must set out the evidence, if oral, or refer to it, if documentary, with such distinctness that the clerk can certify to the papers referred to.

If the party chooses to make a statement on appeal from such an order, that statement must purport to contain simply a history of what transpired before the District Judge on the hearing of the motion. He must set forth the representations on which he acted—all of them, and nothing beyond them. These principles are all well established. (*Gregory v. Frothingham*, 1 Nev. 253; *Gray v. Harrison*, Id. 502; 15 Cal. 198; 9 Id. 277; 10 Id. 480.)

The statement on appeal from the order does not purport to set forth the proceedings before the District Judge upon the motion, and must therefore be disregarded.

As to the statement on appeal from the judgment:

The appellant ought not to be allowed to make any use of this statement, for the reason that it was never served upon respondents or settled by the Judge.

No notice whatever of its filing was given to us, and we were ignorant of its existence until after the time for filing amendments had expired.

The statute seems most awkwardly to be silent as to any service, but the general rules of judicial proceedings will hardly permit a party to be bound by the action of the opposite party without notice in some form.

However, this is of little importance in this cause, inasmuch as the statement as filed is of no possible value to appellant.

The rule is well settled that upon an appeal from a judgment, the Appellate Court will not review the evidence or consider whether or not it sustains the verdict or findings.

This can only be done through a motion for new trial, and an

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appeal from the order of the Court below on such motion. (*Lockwood v. Marsh*, recent decision this Court, April Term; 2 Cal. 121; Id. 23; Id. 119; Id. 484; 3 Id. 179; 7 Id. 399; 8 Id. 108; Id. 537; 13 Id. 599; 15 Id. 880; 18 Id. 394; 26 Id. 599; 27 Id. 68.)

Under the rule the statement is easily disposed of. It contains two assignments of error in the *findings of fact*, with certain evidence to support them and nothing more. First, that the property was partnership property; second, that the process was regularly served, which in fact involves the same question as to whether Sperry and Shiverick were partners. These being questions of fact, cannot be reviewed except through a motion for new trial. This leaves the case to stand upon the judgment roll, and the statement on appeal. Appellant in assigning errors, does not claim that the judgment is not in accordance with the findings.

Second. This mill was, at the time the mortgage was given, partnership property, belonging to the firm of Sperry & Co. The site was purchased and all the improvements erected jointly, with the money of that firm. This constitutes it partnership property, although in its nature realty. (*Delmonico v. Guillaume*, 2 Sandf. Ch. 366; Story on Partnership, Secs. 92-3; *Chase v. Steel*, 9 Cal. 64; Story's Eq. Jurisprudence, Sec. 674; 3 Kent's Com. 37; 1 Leading Cases in Eq. 240.)

Third. Real estate, acquired by a partnership for partnership purposes, is in equity deemed and treated as *personal* estate. It becomes a part of the stock-in-trade, and so far as the beneficial interest is concerned, is subject to the same rules of ownership and disposition as personal property. (*Dupuy v. Leavenworth*, 17 Cal. 262; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Sigourney v. Munn*, 7 Conn. 11; Story's Eq. Jurisprudence, Sec. 674; Collyer on Partnership, Sec. 135, and note; 3 Kent's Com. 37-8, and note; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Hoxie v. Carr*, 1 Sumner, 173.)

A deed of one partner of his interest in partnership effects, does not pass an undivided interest in the property, but only an undivided interest in what is left after the debts are paid. (*Neal v. Jones*, 2 P. & H. Va. 339.)

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Whitmore having taken the mortgages, with full knowledge of the indebtedness of the firm, took only a lien on any possible surplus after the payment of debts.

The proper remedy was pursued to reach the firm's interest, the title of the partner was sold for a firm debt, and the purchaser stood in the shoes of a creditor of the firm. He has a right to insist that the mortgagee shall only be entitled to any surplus left after payment of firm debts. This was the proper *forum* (a Court of Equity) to determine whether there was any surplus to which the mortgagees are entitled. The proof shows the whole property was exhausted in paying partnership debts. Therefore there is nothing for the mortgagees, and the bill must be dismissed. (*Schudder v. Delashment*, 7 Iowa, 39.)

The mortgage executed by one partner did not interfere with the rights of the partners to dispose of this property to pay partnership debts, neither did it interfere with right of creditors to sell it at forced sale. (See 7 Conn. 112, 324.)

The objection, that in describing the firm of Sperry & Co., we have named one who was not a partner in that firm is too technical. The material allegation is that Sperry & Co. contracted the debt, and there was a judgment against the defendant, and there was a judgment against the property of Sperry & Co.

The answer substantially, though not in direct terms, charges that Whitmore knew of the partnership character of the property. It charges that he took their mortgage fraudulently to defeat partnership creditors.

If it did not contain this averment, it is immaterial. If the mortgagee relies on the fact that he took the mortgage innocently and in ignorance of the partnership liabilities resting on the property, he has the affirmative; he must plead this fact in defense. (*Gallatian v. Erwin*, Hopkins' Ch. 48; *Gallatian v. Cunningham*, Hopkins' Ch. 48; *Denning v. Smith*, 3 John. Ch. 344; Story's Eq. Jurisprudence, Sec. 608.

Opinion by BEATTY, C. J., LEWIS, J., and JOHNSON, J., concurring.

This was a bill filed to foreclose a mortgage upon what counsel

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in the cause term a tract of land. The plaintiff alleges that in February and March, 1862, the defendant, N. Shiverick, was the owner of an undivided half interest in the property described in the mortgages set out in the complaint; that being such owner or having such interest in the property, he executed two mortgages, one to the plaintiff, another to a third party who has since assigned to plaintiff.

He makes N. Shiverick, Antoine Laroche, and Peter Frothingham parties defendant, and prays a foreclosure and sale of the interest mortgaged to him.

Frothingham answers, and states in his answer substantially that at the time the mortgages were executed, the property belonged to Sperry & Co., a firm composed of A. J. Sperry, N. Shiverick, E. P. Whitmore, (the assignor of one of the mortgages to plaintiff) and Thomas McFarland. That at the time of the execution of said mortgages the firm was insolvent, and they were executed for fraudulent purposes. That shortly after the execution of these two mortgages, judgments were had against the firm of Sperry & Co. for about \$1,000. That the entire property of the firm (including this property, the undivided half of which Shiverick purports to have mortgaged) was sold under execution, a regular conveyance made thereof by the Sheriff, and that he (Frothingham) became the owner by purchase from the party who bought at Sheriff's sale. He relies on his title thus derived from a Sheriff's sale, as a defense to this action. Laroche disclaims all interest except as mortgagee of Frothingham.

The cause went to trial in the Court below, and the Judge there found the following facts and conclusions of law :

"The property described in the mortgages sued on was, at the time they were executed, the copartnership property and assets of the firm of Sperry & Co., and of this fact the plaintiff, at the time the mortgage to him was executed, and E. P. Whitmore, at the time the mortgage was executed, had notice.

"Also, at those times, the firm of Sperry & Co. was embarrassed, pressed by their creditors, unable to pay their debts, and insolvent, and the said mortgagees respectively at the times they

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took their mortgages, had notice of such embarrassment and inability to pay.

"Also, in an action commenced and pending in the District Court of Ormsby County, Territory of Nevada, by E. Ruhling & Co. against Sperry & Co., to recover a copartnership indebtedness of the latter firm to the former, the summons was served upon J. A. Sperry, a member of the firm of Sperry & Co.; and on the twenty-first day of April, A.D. 1862, E. Ruhling & Co. recovered judgment for the sum of \$2,058.75 debt, besides \$40.75 costs, which debt was the amount then due and owing by said Sperry & Co. to E. Ruhling & Co., and accrued subsequent to August 13th, A.D. 1861.

"Also, in an action commenced and pending in said District Court of Ormsby County by Hickok & Co. against said Sperry & Co., to recover a copartnership indebtedness of the latter firm to the former, the summons was served upon J. A. Sperry, a member of the firm of Sperry & Co., and on the eighteenth day of April, A.D. 1862, Hickok & Co. recovered a judgment for the sum of \$2,229.25 debt besides \$57.15 costs, which debt was the amount then due and owing by said Sperry & Co. to said Hickok & Co., and accrued subsequent to August 13th, A.D. 1861.

"The said judgments were severally docketed and executions issued thereon to the Sheriff of Ormsby County, under which said Sheriff sold said property, on the thirtieth day of May, A.D. 1862, to McCullough & Ruhling, composing the firm of E. Ruhling & Co., for the sum of \$4,698.29, which was paid by them and was the full value thereof, as well as the amount of said executions and costs; and after and upon the expiration of six months from the time of sale, said Sheriff executed a deed of said property to McCullough & Ruhling, composing the firm of E. Ruhling & Co., who thereafter sold the same to the defendant, Frothingham, and gave him possession, and the same has remained in his possession ever since, as owner thereof.

"The claims of other creditors of the firm of Sperry & Co. remain still unpaid. The property sold under said execution was the entire assets of the firm of Sperry & Co. During the time said liabilities of the firm of Sperry & Co. were incurred and the

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said judgments recovered and sale made, the firm was composed of J. A. Sperry, N. Shiverick (who is one of the defendants in the action) and Thomas McFarland, and they represented to the creditors of said firm that E. P. Whitmore was also a member of said firm, which representation the said creditors believed to be true.

"The notes and mortgages mentioned in the complaint were all executed out of the State and Territory of Nevada, and in the State of California, and the note and mortgage executed to E. P. Whitmore became due and payable on the twenty-eighth day of June, A.D. 1862, and the other note and mortgage became due and payable on the tenth of September, A.D. 1862, and no action was commenced on either until the commencement of this action.

"The conclusions of law upon the foregoing facts are that this action is not barred by the Statute of Limitations; that the said property and its full value was necessarily and properly applied to the payment of copartnership liabilities of Sperry & Co. to Hickok & Co. and E. Ruhling & Co.; that the purchasers of said property, under the execution in favor of Hickok & Co. and E. Ruhling & Co., and those holding under them, are entitled to hold said property free and clear of any and all incumbrances by virtue of said mortgages, or either of them, and that said mortgages, or either of them, cannot be enforced against said property.

"Let judgment be entered accordingly.

"R. S. MESICK, District Judge."

The findings of the Court were filed December 6th, a judgment entered up December 7th, and on December 8th a paper was served by the appellant (plaintiff in the Court below) on respondent's counsel which may, we suppose, be properly termed a notice of motion for a new trial, although not in the usual form of such notice. This notice does not seem, however, to have been followed up by any statement whatever on motion for a new trial. On the twenty-seventh of the month a statement on *appeal* was filed. This, it will be seen, was many days after the time for statement on motion for new trial had expired. On the fifth of January, 1867, the motion for a new trial was called up and overruled.

On the nineteenth of January, 1867, *a statement on appeal from the order overruling the motion for a new trial was filed by appellant.*

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The first question to be determined is, what figure do these statements cut in the case? The first statement as a *statement on appeal*, which is clearly contemplated by the statute, was made in time, and if it shows any such error as can be reviewed where there is no motion for a new trial, it is sufficient to reverse the case. This statement we will hereafter notice. The second statement can serve but one purpose; that is, to show that the Court committed some error in overruling the motion for new trial. We cannot mix up the two statements, taking portions of one to help out the other.

There are here two separate and distinct appeals—one from the judgment, the other from the order overruling the motion for a new trial. Let us first examine the latter. Before a District Court can regularly grant a new trial two preliminary steps are necessary. First, there must be a notice served on the adverse party that a motion for that purpose will be made. Second, that notice must be followed either by affidavit or else by a statement showing the grounds upon which such motion will be based. The statute declares that if such affidavit or statement is not filed within the prescribed time, “the right to move shall be deemed waived.” In this case, “the statement on appeal from the order of the Court overruling the motion for a new trial” totally fails to show that there was either an affidavit or a statement filed in support of the motion. Consequently the Court did not err in overruling the motion for a new trial. The Court could not grant the appellant’s motion when by his own conduct he had waived the right to move for a new trial. This latter statement then, not being available to show that the Court erred in overruling the motion for a new trial, ceases to be a paper of any importance in the case. As we have already substantially said, it cannot be appended to and made a part of the original statement on appeal. That statement had to be made within twenty days after judgment. If no amendments were offered it could not be patched up by another statement made more than forty days after judgment. The latter statement would properly include only such things as accrued subsequent to the trial and pending the motion for new trial. If it contains other matter, it is surplusage and must be disregarded. Having disposed of the appeal from

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the order overruling the motion for a new trial, let us now examine the appeal from the judgment.

The statement on appeal commences in this way :

“The plaintiff’s statements on appeal from the judgment in this cause: The ground upon which the plaintiff will rely on appeal is the *evidence*, findings, and decision of the Court that the mortgaged premises set out in the complaint herein at the time the mortgages were executed were the partnership property, and the assets of the firm of Sperry & Co.”

If we give to this language its literal meaning, it shows that the evidence established just what the appellant complains was not established, to wit: that the mortgaged property was partnership property at the time of the Sheriff’s sale.

We presume (though the language used does not convey the idea) the appellant meant to complain that the finding of the Court to the effect stated was *not* supported by the evidence in the case. Overlooking the error in this part of the statement, let us see how the remainder of the statement is made up.

Immediately following what we have before quoted and commented on, is the following language: “and that the *mortgages* [mortgagees] severally had notice thereof; that the said company was insolvent, of which said mortgagees had notice, all the evidence in the case tending to prove the tenure by which said company held said property, and plaintiff’s notice thereof and of the company’s indebtedness, is the deed from J. S. Henning to J. A. Sperry and N. Shiverick, conveying said property to them, which deed was introduced in evidence at the trial, a copy of which is herein contained and made part hereof; the depositions of said Sperry and Shiverick in evidence, copies of which are herein set out and made part hereof. In addition to this evidence, the plaintiff testified that the consideration of the notes and mortgages was money advanced for and used in improving the mortgaged property and in paying the debts of Sperry & Co., which advances were made prior to the indebtedness to Hickok & Co. and E. Ruhling & Co., and that he, the plaintiff, did not know of the embarrassment of Sperry & Co. until after the expiration of these mortgages; and that E. P. Whitmore had no knowledge of the condition of the affairs of Sperry & Co.

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“And in the further error of the Court, in its findings and decisions, that in the said proceedings of E. Ruhling & Co. and Hickok & Co. against Sperry & Co., the title to or interest in said mortgaged premises of N. Shiverick and his mortgagees passed to the purchaser under such proceedings at Sheriff's sale, etc., without any process or summons having been served on said Shiverick and his mortgagees, and it being in evidence that no process was ever served in either of said proceedings on any of the persons made defendants therein, except on said Sperry. (Deed from Henning to Sperry & Shiverick, to wit.)”

After this follow the deed, an agreement, several depositions, etc., all seeming to have been documentary evidence in the cause. The statement then winds up as follows:

“And the plaintiff says the foregoing statement contains all the evidence in said case tending to prove the tenure by which said Sperry and said Shiverick held the mortgaged property described in the complaint, or of the notice of the plaintiff, or said E. P. Whitmore of the pecuniary position of the firm of Sperry & Co. at time of accruing of the indebtedness mentioned in the complaint, or at the time of the execution of said mortgage.”

The first question is, does this statement negative the idea that there may have been before the Court below sufficient evidence to show that Sperry & Co. were the owners of the property in dispute at the time they were so found to have been by the Judge who tried the case? If we give a very liberal interpretation to the language used, perhaps it does. But the language is extremely confused, and not clearly intelligible. The statement is *ex parte*, never served on the opposite party, no amendments offered thereto, and not settled by the Court. Such a statement is allowed by the statute. Statements on appeal are (probably by an oversight of the Legislative branch of the Government) not required to be served. But whilst such a statement must be tolerated, it should not be allowed to establish more than is *clearly stated*.

We should hesitate then to hold that this statement was sufficient to authorize this Court in saying the first finding of fact by the Court below is not supported by the evidence. But if this part of the statement had been ever so clear and explicit, there is another

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objection to reversing the judgment on the ground that the findings are not sustained by the evidence.

Our Practice Act was copied almost *verbatim* from the California Practice Act as it stood at the time ours was enacted. Under the California code of practice, the Supreme Court of that State had almost uniformly refused to review the facts of a case unless there had been a regular statement and motion for new trial. (See *Brown v. Graves*, 5 Cal. 119-20; *Brown v. Tolles*, 7 Cal. 399; 8 Cal. 108; 15 Cal. 380; *Gagliardo v. Hoberlin et al.*, 18 Cal. 394.)

The only conflict that we can discover in the California cases on this point, was in holding, in some instances, that the rule did not apply to actions of equitable cognizance, but was confined to those of a strictly legal nature. But finally this distinction ceased to be recognized, and in the last case cited was distinctly overruled, and since then the rule made applicable to chancery cases and actions at law. We deem it best to follow the practice thus established in California, and think it especially appropriate that the practice should be established in a case of this kind, when it is so extremely doubtful if the statement would aid the appellant, even if we were to decide that we could review the facts of the case on the statement on appeal, without any previous motion for new trial. Whilst the party that complains that the verdict of a jury or the finding of the Court is against the evidence in the case must present that particular point by motion for new trial, or it cannot be looked into in this Court, we do not mean to say other errors committed in the progress of a trial may not be brought up either upon a bill of exceptions or upon statement on appeal. Doubtless most errors committed during the progress of a trial may, at the option of the appellant, be first brought under review in the Court below upon motion for new trial, and upon that Court refusing relief, be reviewed here on appeal from the order refusing a new trial; or they may be brought directly before this Court on an appeal from the judgment. This Court can look into bills of exception, statement on appeal, the findings of the Court and the judgment roll, for the purpose of correcting errors shown by any of these records. But for the purpose of setting aside a verdict or finding on the ground of its not being sustained by the evidence, it can only look to a statement on motion for new trial.

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Having disposed of the statements in this case, it only now remains to determine whether the judgment of the Court below is justified by the pleadings and by the findings of fact by the Court.

The findings of fact by the Court say the property in dispute was, at the time the mortgages were executed, "the copartnership property and assets of the firm of Sperry & Co."

Section 32 of the Practice Act is as follows: "Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: First, if the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the Court otherwise direct, and if he recover judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served: or second, if the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants."

In this case the suits of Ruhling & Co. and W. B. Hickok & Co., on whose judgment the property was sold, were commenced against N. Shiverick, A. J. Sperry, Thomas McFarland, and E. P. Whitmore, composing the firm of Sperry & Co. The summons was served on A. J. Sperry only, and judgments taken against him personally and against the joint property of Sperry & Co. The first question is: does the finding of facts show that this property, at the date of their judgments, was the joint property of Sperry & Co.? It appears to us it does. The language of the finding does not use the word *joint*, but it says *copartnership property and assets*. Collyer on Partnership, Sec. 123, p. 108, quotes approvingly this language from Lord Hardwicke: "The partners themselves are clearly joint tenants in the stock and effects. They are seized *per my et per tout*." Finding that this property was copartnership property was in effect finding it was the joint property of the partners composing the firm of Sperry & Co. But even if there was a question about copartnership property and assets being technically *joint* property, still it was clearly joint property as

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contemplated by the thirty-second section of the Practice Act. The very object of that Act was to authorize a judgment, after service of summons on one member of a trading or manufacturing firm, which would reach the entire partnership property. We think the finding of the Court here sufficiently shows this property was subject to an execution against the property of Sperry & Co.

Holding, then, that Sperry & Co. were the joint owners of the property up to the time of the execution of the mortgages, the question naturally arises: what effect did the execution of these mortgages have upon the property? When two or more parties hold property by joint title, and one of the joint owners conveys his interest, the joint tenancy is immediately destroyed. So too, it is said that if one of the joint tenants mortgages his interest in fee, this will destroy the joint tenancy. (See Hilliard on Mortgages, vol. 1, p. 12.)

This latter proposition, however, we are inclined to doubt, or rather to think too broadly expressed. Where the title to mortgaged premises rests before foreclosure, seems to be one of those points on which neither Courts nor commentators agree. The decided preponderance of opinion, however, seems at this day to be in favor of the proposition that the title does not pass from the mortgagor before breach of condition. By many it is held that even after breach of condition the title still remains in the mortgagor until foreclosure. We are satisfied the best authorities hold that the title remains in the mortgagor until breach. If the fee remains in the mortgagor until breach, we do not see on what principle it can be held that a mere mortgage, not changing the fee of the property, should destroy a joint tenancy. We are not disposed to hold a proposition so apparently against principle, upon the mere opinion of Mr. Hilliard, however respectable that may be, without some judicial decision to sustain him. Hilliard cites Powell on Mortgages (a work we have not at hand) to support his opinion. Whether Powell is supported by any judicial decision we are unable to determine.

The reasons for holding, in this case, that a mortgage by one of the joint tenants should not have the effect of destroying the tenure by which the partners hold the property, are much stronger than in

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an ordinary case of joint tenancy. Partners are only *quasi* joint tenants; or to speak more accurately, it may be said that partners are joint tenants whose rights and duties are qualified in many respects by the law merchant. The right of survivorship exists only in a limited and qualified manner. A surviving partner takes the property, and may sell and dispose of it for the purpose of settling the partnership affairs. But unlike other survivors, (who take the joint property for their own use) after the partnership affairs are settled he must account to the representative of the deceased partner for his net interest in the partnership effects.

On the other hand, ordinary joint owners may at their pleasure sell their joint interest and thus destroy the joint tenancy. A partner cannot sell his interest in the partnership property, so as to deprive his cotenants of their lien on the property for partnership debts or liabilities due from the party selling. As the mortgages in this case were given on partnership property, and with a full knowledge on the part of the mortgagees that it was partnership property, we think they did not change the tenure by which the property was held, and that it was liable to be sold under any execution which was legally issued against the property of Sperry & Company.

But it is contended by appellant that there was no legal execution against Sperry & Co., because Ruhling & Co. and W. B. Hickok & Co. sued Sperry & Co., consisting of four members, and the findings in this case show that the Sperry & Co. who were interested in the property in dispute only consisted of three members.

We think this is hardly a correct view of the case. Ruhling & Co. and Hickok & Co. sued *the* Sperry & Co. who were erecting a mill and transacting business with them. Of this company, beyond all question, A. J. Sperry was one member. In their complaints they allege that Shiverick, McFarland and Whitmore were also members of that firm. The Court in this case find they were mistaken as to Whitmore being a member; that only the three first named were partners in the firm.

Now it appears to us that was an immaterial fact, and ought not to have been investigated in this case. Sperry was served with summons and was bound to make his defense or ever after hold his

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peace. He might have shown that he never made a contract or contracted a debt to the plaintiffs jointly with Whitmore, and this would have been a good defense to the action unless the plaintiffs had by leave of the Court amended their complaint (as they could have done under our statute) and stricken out the name of Whitmore. But Sperry made no such defense to the action, and consequently the judgment was good against him. It would be strange indeed if a stranger to the proceedings could be allowed to come in at this late date and make a defense for Mr. Sperry, which he declined to do for himself when he had an opportunity, four or five years since. The judgment, so far as it is a complete judgment, is only against Sperry. So far as it affects the joint property it only reaches it through Sperry as one of the members of the firm of Sperry & Co. The execution could only be levied on the individual property of Sperry and the joint property of the company which he represented. If Whitmore was a member of that company it was right that his interest in the joint property should be sold; if he was not, certainly a judgment against the property of the firm did not hurt him.

Here the executions were levied on property which the Court finds belonged to Sperry & Co. That is, to that firm of which A. J. Sperry (who was served with summons) was a member, and with which Ruhling & Co. and W. B. Hickok & Co. had dealings. If it belonged jointly to that firm, it was wholly immaterial whether the firm consisted of three or three hundred persons.

The judgment of the Court below must be affirmed.

RESPONSE TO PETITION FOR REHEARING.

Opinion by BRATTY, C. J., LEWIS, J., concurring.

We granted a rehearing in this case mainly because the principal points in the case, on which our first decision rested, had been scarcely noticed by counsel in their arguments or briefs.

The proper construction to be put on Sec. 32 was one important question which we were anxious to have fully discussed. That dis-

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cussion has, however, only confirmed us in our views, heretofore expressed, in regard to that section of the Practice Act.

The object seems to have been to make all partnerships or joint associations, so far as their joint property was concerned, answerable on judgments obtained by the service of summons on a single member, the service on one member having the same effect on the company as service on a proper officer of a corporation has on such a body. Keeping this object of the law in view, many of the objections raised by appellant to this judgment seem to be very readily disposed of.

The first objection raised by appellant is that defendant Frothingham pleads that the title to the property in controversy, when Shiverick executed his mortgage, was held jointly by A. J. Sperry, N. Shiverick, E. P. Whitmore, and Thomas McFarland, composing the firm of Sperry & Co., while the findings show that only three of those parties compose that firm. Therefore the answer and findings, being at variance, do not support the judgment for defendant. That if the proof does not support the allegation of the answer, the defense must fail.

A trifling variance between the *probata* and *allegata* is not material. Here the variance was of no manner of importance. In the suits of Ruhling & Co. and Hickok & Co. four parties were sued, the complaint alleging they all four composed the firm of Sperry & Co. One of the four parties (confessedly a member of that firm) is served, and being so served, the law makes him answer for all his partners. They are (to the extent of the partnership funds) just as much bound by his action as they would be by the action of an attorney employed by them jointly. Now Sperry confesses (and in confessing for himself he confesses for all his partners) that the firm was composed of the four members charged in the complaint of Ruhling & Co., as forming that association. So far, then, as that company is concerned, it is admitted Whitmore is a partner; and no member of that company, nor any person claiming under them, can be permitted to say he was not a partner. With regard to E. P. Whitmore himself, of course the thing would be different. He, not being a member, would not be affected by the admissions of parties with whom he was not connected.

The real defense here set up by Frothingham was, that the property, when Shiverick executed his mortgage, belonged jointly to Sperry & Co., and was bound for their joint debts, etc. The fact that he was mistaken as to the number of persons composing that firm was of no importance whatever.

Appellant contends that if this was partnership property, held jointly by the partnership firm of Sperry & Co., still each partner might mortgage his individual share, and the mortgage would be good against all persons, except partners and creditors of the firm. That is true. But in this case it is claimed that a creditor sold this property under regular proceedings against the firm. If so, the entire title passed, and Frothingham holds under the claim of a creditor.

The clerical error of the Judge in writing J. A. Sperry for A. J. Sperry is certainly a matter of no importance. Nor is it of any importance that the Judge, in speaking of the judgments against Sperry & Co., spoke of the plaintiffs as Ruhling & Co. and Hickok & Co., instead of mentioning the names of the persons composing such firms. These objections are rather too technical to be seriously considered.

Nor is the objection that no judgment *eo nomine* could be entered against Sperry & Co. any more tenable than the other. The judgment in this case, so far as it was a personal judgment, was only against Sperry, the defendant served; but it was also a sort of judgment *in rem.* against the partnership effects of Sperry & Co. The debt was contracted by the firm of Sperry & Co., and all the joint property owned by the members of that firm was bound for it. The counsel for appellant seems wholly to lose sight of the distinction between "defendants jointly indebted" and defendants jointly sued. In this action, four defendants were jointly sued, but it turns out that only three of them were jointly indebted. Now this judgment, which is in the nature of a judgment *in rem.*, is only effective against the joint property of three of the defendants sued, for it seems Whitmore was not bound by the joint contract. If in fact there had been joint property held by Sperry, Shiverick, Whitmore, and McFarland, and it had been sold under this execution, Whitmore could certainly, by a proper proceeding, have set aside

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the sale, or at least recovered his fourth of the property, by showing he was not a member of the firm of Sperry & Co.; for he not being a partner of Sperry, nor a joint contractor with him, was not bound by his silence or his confession. But the other three being actual partners in the firm of Sperry & Co., they were, in the language of the statute, "defendants * * *jointly*" indebted, and as such their joint property was bound.

It is contended that this property could not pass under the section of the Practice Act heretofore referred to, because that only refers to *joint* property, and partners cannot hold real estate as *joint owners*; and in support of this proposition we are referred to the case of *Howard v. Priest*, and *Dyer v. Clark*, 5 Met. Mass., and Sec. 135 of Collyer on Partnership. These cases do not, in our opinion, sustain any such proposition. At law, partners, like any other persons, may take a conveyance of real estate to themselves, either as joint tenants or tenants in common.

To show that such was the opinion of the Court in the case of *Dyer v. Clark*, just referred to, we need only quote the following language of Chief Justice Shaw in delivering the opinion in that case: "Should the partners take their conveyance in such mode as to create a joint tenancy, *as they still may*, though contrary to the policy of our law, still it would not accomplish the purpose of the parties." In the foregoing quotations the italics are our own.

Then in truth, partners may hold real estate, so far as the legal title is concerned, like any other persons, either as joint tenants or tenants in common. But when property has been acquired with partnership funds and for partnership purposes, whatever the legal tenure may be, Courts of equity will treat it as partnership property. Or, as Courts sometimes say, they will treat it as personal property. Of personal property, partners are admitted to be joint tenants. Yet Courts of equity, in speaking of real estate held by partners, always say that in equity it will not be treated as joint property, but as held in common, each tenant in common holding his interest in trust for the partnership. They say they cannot hold it to be joint property, otherwise, the *jus accrescendi* would intervene in case of the death of one of the parties, to the great detriment of trade. But the *jus accrescendi* applies as well to personal property as to real

estate, yet the Courts have no hesitation in calling the personal property of partners joint property.

Now the truth is, that phrase, *jus accrescendi*, when applied to real estate, seems to have frightened Courts into all sorts of absurd and contradictory expressions. It does not seem to have done any harm so far as results were concerned, but merely led to confusion of expression. As regards personal estate, the phrase seems to have been very harmless. Judges could deal with it without being frightened out of their propriety.

Chief Justice Shaw, in delivering the opinion of the Court in the case of *Dyer v. Clark*, (5 Met., p. 576) uses this language: "Such, indeed, is the result of the application of the well known rules of law, when the partnership stock and property consist of personal estate only. And as partnerships were formed mainly for mercantile transactions, the stock commonly consisted of cash, merchandise, securities and other personal property; and therefore the rules of law governing that relation would naturally be framed with more especial reference to that species of property. It is therefore held that on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts are paid; though, for the purpose of encouraging trade, it is held that the harsh doctrine of the *jus accrescendi*, which is an incident of joint tenancy at the common law, as well in real as in personal estate, shall not apply to such partnership property; but, on the contrary, when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds." In plain English, personal property of partners is joint property with only a qualified right of survivorship. Real estate is in law common property or joint property, just as the deeds of the conveyance make it. In equity, all real estate acquired with partnership funds and used for partner-

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ship purposes, is, like personalty, joint property, with only a qualified right of survivorship.

The answer of Frothingham in this case alleges that the property which was sold under the judgments of Ruhling & Co. and Hickok & Co., was the joint property of Sperry & Co. The finding of the Court in reference to this matter is that the property was the copartnership property and assets of the firm. It would have been more satisfactory if the finding had been more explicit as to the tenure by which this property was held. An Act, however, passed by the Legislature of this State, approved March 11th, 1865, in relation to appeals, contains the following section :

“ In cases tried by the Court without a jury, no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless exceptions be made in the Court below to the finding or to the want of finding ; and in case of a defective finding, the particular defects shall be specifically and particularly designated ; and upon failure of the Court below to remedy the alleged error, the party moving shall be entitled to his exceptions, and the same shall be settled by the Judge, as in other cases ; provided, that such exceptions to the finding shall be filed in the Court within five days after the making of the finding or decision to which exception is made.”

In this case it seems to us, if the plaintiff thought this finding not sufficiently specific as to the tenure by which Sperry & Co. held this property, he should have excepted to this finding, pointing out its particular defects. In the absence of such exceptions, we think it sufficient to support the judgment. The judgment of this Court will be in accordance with the opinion heretofore filed.

JOHNSON, J., not having joined in the order granting a rehearing, does not participate in this decision.

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A. S. BRYANT, RESPONDENT, *vs.* THE CARSON RIVER LUMBERING COMPANY, APPELLANT.

Where there is a statement on motion for new trial, and the moving party appeals from the order refusing a new trial, the case comes before this Court on the same statement on which the Court below acted, and there is no necessity for a statement on appeal.

A verdict will not be set aside merely because it is against the weight of evidence. In a mortgage of personal property, the title passes to the mortgagee, subject to defeasance upon payment of the debt, and after breach of condition he has the absolute right, after due notice, to sell the property at public or private sale.

The purchaser of personalty sold by a mortgagee gets a perfect and indefeasible title. There is no right of redemption from such purchaser. That right only exists for a reasonable time after breach as against the mortgagee, who has not sold the property.

The fact that the purchaser knows that his vendor is only a mortgagee, makes no difference as to the character of title acquired by the purchase.

The section of the Practice Act which declares there shall be but one form of action to foreclose a mortgage, does not deprive a mortgagee of his right to sell without action.

Whether a mortgagee can sell without notice given—*Quere?*

A mortgage of personal property without delivery, is good as between the parties.

APPEAL from the District Court of the Second Judicial District, Ormsby County, Hon. S. H. WRIGHT, presiding.

The facts are stated in the opinion so far as they relate to the points decided.

R. M. Clarke, Esq., for Appellant.

There is no question as to the facts of a mortgage to Drew, and a sale by him to defendants. A mortgagee after condition broken, may sell personal property. (2 Hilliard on Mortgages, 478; 8 N. H. 293; 8 Johns. 96; 9 Wend. 83-4; 7 Cowen, 292.)

Even if the sale was illegal at first, Bryant ratified it.

John Cradlebaugh and W. Patterson, Esqs., for Respondent.

Drew, as mortgagee, had no right to sell the property. Nor was the mortgage valid for any purpose, as no delivery was ever had under it.

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There being no statement on appeal, the Court can only consider the judgment roll. (Practice Act, Sec. 276, 363; *Dobbins v. Dollarhide*, 15 Cal. 374; *Barrett v. Tewksbury*, 15 Id. 354; *Hutton v. Reed*, 25 Id. 482; *Burnett v. Pacheco*, 27 Id. 410; *Vilhac v. Biven*, 28 Id. 413.)

In this action the defendants do not set up their right to the possession of the property by virtue of the mortgage given by plaintiff to Drew, but claim ownership of the property, and had used and converted the same to their own use under the claim of being the owner.

Clark v. Ridout, 39 N. H. 238, is directly in point, and directly decides the action of trover the proper action to be brought. *Charter v. Stevens*, 3 Denio, 33, is to the same point.

A mortgagee of personal property may enforce his lien by foreclosing his mortgage, or upon due notice may sell the mortgaged property at public auction. One or the other must be done. (*Wilson v. Brannan*, 27 Cal. 270.) In this case no such suit was brought or notice given, or a public sale of the property had, but the property was used and sold by the defendants without any right or authority of law.

Opinion by LEWIS, J., BEATTY, C. J., concurring, and JOHNSON, J., concurring specially.

It is claimed on behalf of respondent in this case, that in the absence of a statement on appeal this Court cannot extend its inquiries beyond the judgment roll, and as no error is apparent from that, the judgment must be affirmed. The record, however, contains the statement used on the motion for new trial, which purports to contain all the material evidence adduced upon the trial, together with an assignment of the errors complained of by appellant; and the appeal is taken, both from the judgment and the order refusing a new trial. In such cases it has been the uniform practice of this Court, to treat the statement on motion for a new trial as a statement on appeal. When such statement contains everything which the appellant wishes to bring to the attention of the appellate Court, there would seem to be no necessity for a distinct statement on appeal. The rule which has been observed by this Court in this

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respect, is recommended by considerations of convenience, and we see no reason why it should not be followed in this case.

We readily agree with counsel that the verdict and judgment should not be set aside simply because the weight of evidence may be against them, because it is presumed that the jurors who see the witnesses and the manner in which they testify, are the better judges of the weight to be given to their testimony. Hence, when they have rendered their verdict, it is entitled to great weight and consideration in an appellate tribunal, for as Coke says: *Veredictum quasi dictum veritatis ut judicium est quasi juris dictum*.

We will not, therefore, set aside a verdict when there is no objection to it except that it is against the weight of evidence. This brings us to a consideration of the merits of the case, as presented by testimony which, in our judgment, stands uncontradicted.

It is established beyond all question that Drew, the mortgagee of the lumber, sold the mortgaged property to the defendant, and received a valuable consideration therefor. Drew in his testimony says; "I sold to Russell & Crow, and understood at the time that I had the right to sell."

A Mr. Crow on the part of the defendant testified: "Bryant told me to buy of Drew; said he was willing for Drew to sell, and for me to buy of him. I then (for the defendant) bought the timber and logs from Drew." The receipt delivered by Drew to the defendant, acknowledging the payment of a portion of the consideration money, also shows a sale, and states the consideration to be thirteen dollars per thousand feet.

A. M. and C. P. Crow both testify that Bryant stated in their presence that Drew was authorized to sell the timber. True, Bryant denies having made any such statement, but there is nothing in the testimony to show that Drew did not sell the property to the defendant, or to support the assumption of counsel for respondent, that Drew simply made an assignment of his mortgage; and the record discloses a fact rather inconsistent with this theory of the transaction—that is, the notes secured by the mortgage to Drew were all surrendered to Bryant, the maker, upon the sale to the defendant, both the plaintiff and Drew thereby treating them as paid and canceled. Had it been the intention simply to assign

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the mortgage, the notes which evidence the debt it would seem, would have been transferred to the assignee.

Upon the re-examination of Drew he says: "I sold my papers. What I had I transferred. I cannot say whether Bryant did or did not tell me to sell the timber."

What he meant to say evidently was, that he simply sold whatever right or title he had in the mortgaged property to the defendant. Giving such interpretation to what he said upon his re-examination, and there is no inconsistency between it and what he stated upon his examination in chief, because, as we shall show, he had the absolute title and had a right to sell it.

There is nothing, therefore, in the transcript to support the position that Drew simply assigned the mortgage to the defendant, whilst, on the other hand, it is proven beyond all question, that the mortgagee sold the property absolutely.

As the testimony clearly warrants it, the sale will be treated as an established fact in the case. Then follow the inquiries whether the mortgagee had the authority to sell the property, and if so, what interest the purchaser acquired by such sale.

The uniform language of the authorities is, that a mortgage of personal property passes the whole legal title to the mortgagee, subject, however, to be revested in the mortgagor upon the performance of the condition of the mortgage, and possibly by redemption after breach of it. (*Brown v. Bement & Strong*, 8 Johnson, 96; 2 Hilliard on Mortgages, 518; *Ackley v. Finch*, 7 Cowen, 290; *Dewey et als. v. Bowman et als.* 8 Cal. 145; *Tannahill et als. v. Tuttle*, 3 Mich. R. 104.) After breach of condition or failure on the part of the mortgagor to perform his contract, the same authorities hold that the title becomes absolute in the mortgagee to the extent that he may upon due notice to the mortgagor sell or otherwise dispose of the mortgaged property to satisfy his debt. If by a fair sale of the entire property only enough be realized to discharge the demand, the mortgagor has no remedy. (*Brown v. Bement et al.*, 8 John. 96.) Indeed the entire current of authorities supports the proposition that the mortgagee may sell either at public or private sale, and to that extent at least he is treated as the absolute owner of the mortgaged property. *Charter*

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v. *Stevens*, 3 Denio, 33, relied on by counsel for respondent, does not maintain a different doctrine, nor does it in any wise conflict with the general rule of law as we have stated it. It was simply held in that case, that trover might be maintained against the mortgagee for the sale or conversion of a portion of the mortgaged property after the debt had been paid. The Court held that what had been done before the sale of the horse, for the conversion of which the action was brought, was equivalent to the payment of the mortgagee's claim, and therefore that he had no further claim upon the mortgaged property.

"The mortgage," said Beardsley, J., "provides that on failure to pay at the time specified the mortgagee might take possession of the said property and sell the same at public auction, after giving six days' notice of the sale, and satisfy said above-mentioned sum of money, and the interest of the same, and costs of selling the same." "Default in payment," says the Judge, "had been made, and the mortgagee proceeded to sell under the authority contained in the clause of the mortgage. And before he sold the horse, which alone is now in question, enough money had been raised to satisfy the amount due and unpaid, with interest and expenses. The end and object of the mortgage had been thus fully attained, and the mortgagee had no longer any right to the property which remained unsold, or to sell it under the mortgage." The Court, upon these facts, very justly held that the plaintiff could recover in trover the value of the horse converted after the debt had been discharged. But clearly, no such action can be maintained, except where property is sold or converted after the debt is extinguished. But conceding that the case supports the proposition of counsel, still it does not by any means follow that such an action could be supported against the vendee from the mortgagee which is the case at bar. Counsel will also find upon a careful examination of the case of *Clark v. Ridout*, 39 New Hampshire Reports, 238, that it has no bearing whatever upon this point. The defendant in that case claimed no right as mortgagee of the property, but on the contrary distinctly repudiated it, and the Court treated the case as if no mortgage existed. We find nothing in it to justify the construction placed upon it by counsel. Indeed the law authorizing

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the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence that the purchaser from him obtains an absolute legal title as complete, perfect and indefeasible as can exist or be acquired by purchase; and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of Court.

For a reasonable time after breach of the condition of the mortgage, and whilst the property remains in the possession of the mortgagee, the Courts of Equity have uniformly, upon a proper application, allowed a redemption by the mortgagor; but after sale made upon due notice no such right exists, for the purchaser acquires the absolute title. That defendant had notice of the fact that Drew was in possession of the property as mortgagee, is a matter of no consequence whatever; because, as we have shown, Drew as a mortgagee had a right to sell, and notwithstanding the defendant had notice of the mortgage it acquired an absolute title, if the sale was *bona fide*.

But it is claimed by counsel that Sec. 246 of the Practice Act prescribes the only means by which the mortgagor's rights may be foreclosed. We think otherwise. That section simply declares that there shall be but one action for the recovery of a debt, or enforcement of a right secured by a mortgage, which shall be for an enforcement of the lien or mortgage, in accordance with the provisions of the statute. It does not, however, deprive the mortgagee of personal property of right to sell without action, and so it has been directly held in California upon a statute identical with ours. (*Wilson v. Brannan*, 27 Cal. 268.) What might be the effect of a sale made by the mortgagee without notice, and whether notice be necessary or not, are questions which need not be discussed, as there was in this case not only notice but a clear waiver of all informalities in the sale. There is much testimony in the record showing that Bryant had notice of Drew's intention to sell to the defendant, and indeed that he authorized such sale.

But if it be claimed that previous notice is not clearly proven, Bryant's acquiescence in the sale is irrefragably established. The

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plaintiff himself admits that he endeavored to obtain a portion of the purchase money from the defendant, saying that he was to have what remained after Drew was paid. He took back and canceled his notes which were held by Drew, and which were secured by mortgage. And after the sale was made he charged the defendant, and obtained his pay, for assisting in taking the property in question out of the river, refusing to let the defendant haul it away until he was so paid. Many such facts appear in the record, which leave no doubt whatever of the full ratification of the sale by the plaintiff. Even conceding the necessity for notice, such ratification amounted to a waiver of all rights which the informality in the sale might have given him. Thus the case is left in precisely the same position as if due notice had been given by the mortgagee before the sale.

That the mortgage in question was void because there was no delivery of property to the mortgagee, is a position utterly untenable. The effect of a failure to transfer the possession of personal property to the mortgagee, is simply to make the mortgage void as against third parties. So far as the parties to the instrument are concerned, it is perfectly good without a delivery. None of them can take advantage of that fact for the purpose of defeating the mortgage. The law requiring a delivery of possession of the mortgaged property to the mortgagor was adopted solely for the protection of third parties purchasing or acquiring rights from the person in possession. They alone have the right to take advantage of a failure to comply with this requirement of the law. Surely the mortgagor cannot defeat the mortgage upon any such ground.

We conclude, therefore, that the mortgagee sold the property to the defendant; that he had the right so to sell; and that the defendant acquired an absolute title to the property by means of it.

Judgment reversed, and new trial awarded.

Opinion by JOHNSON, J.

I concur with Chief Justice Beatty and Mr. Justice Lewis as to the conclusions they attain in respect to the first point discussed in their opinion. I also concur in the construction they place on Sec. 246 of the Practice Act, and hold with them "that the mortgagee

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of personal property is not limited to the remedy of judicial foreclosure for the purpose of subjecting the property to a sale for the satisfaction of the debt due." I also concur in the reasoning and in the conclusion respecting the last point discussed in their opinion, concerning the delivery of personal property mortgaged. In relation to the other points, (excepting the one hereafter mentioned) as I do not deem them essential in determining this appeal, I express no opinion. I concur in the judgment on the one ground that the statement on motion for a new trial in the lower Court establishes beyond a question that the plaintiff Bryant ratified the acts of Drew in the matter of the sale of the mortgaged property to the defendant; and he is thereby concluded from questioning the regularity of the sale, so far as it can be affected by any matter in issue in this case.

THE VIRGINIA CITY GAS COMPANY v. THE MAYOR
AND BOARD OF ALDERMEN OF VIRGINIA CITY;
BOTH PARTIES APPEALING.

When the Legislature, in granting a charter to a Gas Company, imposes upon the company, as one condition of the charter, the furnishing of a certain quantity of gas to the city, the law does not raise an implied promise on the part of the city to pay for that which the company are unconditionally required to furnish.

Per LEWIS, J.—When a Gas Company is required to furnish, free of cost, a certain quantity of gas *for the first year*, and a certain larger quantity for the *second year*, and so on to the end of its charter, and the law fixes the time when the gas *works* shall be finished, but does not fix the day when the furnishing of gas shall commence, the company shall have a reasonable time, after the gas works are finished, to lay pipe and prepare for distribution.

The first year for distribution shall commence after the lapse of a reasonable time from the finishing of the works.

Per JOHNSON, J.—When the company was bound to finish the works on or before a certain day, and the city was bound to furnish the burners, etc., the first year would commence when the city was ready to furnish the burners, provided of course that readiness must be either after the works were actually ready for the distribution of gas, or after the expiration of the time when the law required the works to be finished.

If the city neglected to furnish the burners as soon as they were entitled to the gas, still they would only be entitled to the smaller quantity for one year from the time they furnished the burners.

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Per BEATTY, C. J., dissenting.—The company were bound to be ready to furnish gas from the period when the law required the works to be finished. On that day the "first year" commenced, during which they were bound to furnish the smallest quantity of gas. One year thereafter they were bound to be ready to furnish the increased quantity. If the city failed for six months of the first year to furnish burners, it lost the use of the smaller supply for that period, but this did not postpone the period when the company was bound to commence furnishing the large supply.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD RISING, presiding.

The facts are fully stated in the opinions of the Court.

Hoover & Cole, for the City.

The city was entitled to five burners for the first year, say from June 1st, 1864, to June 1st, 1865. For the first six months no gas was used; for the last, just double the quantity per night fixed by law. This was consuming just the right quantity in the year, and the city is not bound for anything.

The law makes it *compulsory* on the company to furnish the gas. If the law compels the company to furnish the gas, how can it be held that it was furnished on an implied contract of the city to pay for it.

Jonas Seely and Will Campbell, for the Corporation. No brief on file.

Opinion by LEWIS, J., JOHNSON, J., concurring in judgment; BEATTY, C. J., dissenting.

The plaintiff is a corporation organized under an Act of the Legislature of the Territory of Nevada, entitled "An Act to create the Virginia City Gas Company," approved November 28th, A.D. 1861.

The second section of this Act grants to the plaintiff the exclusive privilege of supplying the City of Virginia, its inhabitants and residents, with illuminating gas for the period of ten years from the approval of the Act. The third section authorizes it to erect all necessary buildings, works and machinery, also to make the neces-

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sary excavations in the public streets for the purpose of laying gas pipes therein. The law also made it the duty of the plaintiff to complete all the necessary works for the manufacture of such illuminating gas by the first day of June, A.D. 1864, and the sixth and last section of the Act declares that "It shall be compulsory on said company to provide said city, or cities, with sufficient gas to supply five burners for the public streets for the first year; for the second year sufficient gas to supply ten burners; and for each year thereafter sufficient gas for fifteen burners, the lamp burners and lamp posts to be provided by the proper authorities."

As to the preparation for furnishing the gas, the plaintiff seems to have complied with the law; at least there is nothing in the record showing a failure to do so.

This action was instituted on the twelfth day of May, A.D. 1866, for the purpose of recovering the sum of four thousand eighty-three dollars and thirty-three cents, claimed to be due from the City of Virginia for illuminating gas furnished by the plaintiff between the eighteenth day of December, A.D. 1864, and the eleventh day of May, A.D. 1866.

The defendants admit that the gas was furnished by the plaintiff, as alleged in its complaint, but as a defense it is claimed the law makes it the duty of the plaintiff to furnish such gas free of charge; that no more was furnished than the law made it its duty to furnish, and hence that it is not entitled to recover. The Judge below found, as matter of fact, that from the eighteenth day of December, A.D. 1864, up to the eleventh day of May, A.D. 1866, the plaintiff furnished the City of Virginia two hundred and seventy-seven thousand two hundred feet of gas, which was reasonably worth the sum of four thousand one hundred and fifty-eight dollars; that during the first year, that is, from the eighteenth day of December, A.D. 1864, to the eighteenth day of December, A.D. 1865, the plaintiff furnished the City two hundred and one thousand six hundred feet, which was one hundred thousand and eight hundred feet in excess of what the law required the plaintiff to furnish; that this excess was reasonably worth the sum of one thousand five hundred and twelve dollars, for which judgment was given against the defendant. The Court also held that the plaintiff was not entitled to recover

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any compensation for the amount of gas which the law made it its duty to furnish to the city.

Both parties appeal from the judgment, the plaintiff claiming that it should have had judgment for the value of all the gas furnished to the City; whilst counsel for defendant insists that only the amount required by law has been furnished to the City, which, it is urged, the law makes it the duty of plaintiff to furnish free of charge. Whether such be the requirement of the law is the question now to be determined. Unless we can imply a promise on the part of defendant, founded upon sufficient consideration, to pay for the gas furnished to it, there can be no pretense on the part of the plaintiff to a right of recovery, because it seems to be conceded that no express contract has ever been entered into between the parties. Can such contract be created by implication? Clearly not. It will be observed that Sec. 6 of the Act under which the plaintiff was organized makes it compulsory upon it to furnish the City of Virginia with a certain quantity of gas during the entire period of its franchise. Nothing is said in the Act about payment for the gas so furnished. That in granting franchises it is perfectly proper and within the power of the Legislature to impose duties upon those to whom they are granted, and to attach conditions to such privileges, is undoubted. As in this case it was doubtless within the power of the Legislature to make it the duty of the plaintiff to furnish the City of Virginia with a certain quantity of gas, as a condition upon which it should enjoy its franchise, and in our opinion such is the construction to be placed upon the Act under consideration.

A contract is defined to be an agreement of two or more persons upon sufficient consideration to do or not to do a particular thing. The existence of such agreement is either established by the proof of an express engagement between the respective parties, or by circumstances from which the law will presume a promise or agreement. Hence the distinction between implied contracts and express contracts, which lies not in the nature of the undertaking, but only in the mode of proof. No express promise by the defendant to pay for the gas furnished to them is proven in this case, but it is claimed the law will imply such promise from the acceptance of the

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gas by them. Had not the law made it compulsory upon the plaintiff to supply the city with gas, a promise to pay a fair consideration for it would doubtless be implied from the circumstances presented in this case. But the Act of the Legislature has destroyed the possibility of such implication. By making it the absolute, unconditional duty of the plaintiff to furnish the defendant with a certain amount of illuminating gas, a promise on the part of the defendant to pay the plaintiff for performing such duty imposed upon it by the Legislature could not properly be implied. The plaintiff was not induced to furnish the gas to the city of Virginia by any promise or act on the part of the defendant, but by the mandate of the Legislature, which is absolute and unconditional. The contract, if it may be so called, is between the plaintiff and the State, by which, in consideration of the privileges granted by the Legislature, it is made the duty of the plaintiff to furnish the city with a certain amount of gas. The city of Virginia was not a party in any way to that contract though it was beneficially interested in it. It is like a contract between two individuals for the benefit of a third. Thus A, in consideration for some privilege or profit derived from B, agrees to do some act for the benefit of C, who is not a party to the transaction. Though C may acquire advantage or profit from such contract, it will hardly be claimed that he would be holden upon an implied promise to pay a consideration for the profit so acquired by him. In such case the act of A would be induced by his contract with B; hence a promise by C to pay for any advantages he might acquire from it could not very well be implied. Such is certainly this case. The State grants to the plaintiff valuable privileges, and in the grant it is made compulsory upon it to do certain things which are for the benefit of the city of Virginia. The natural presumption is that the Legislature imposed that duty on the plaintiff in consideration for the franchise granted to it.

But it is urged that the intention of the Legislature was simply to require the plaintiff to furnish the city with a certain quantity of illuminating gas provided the city paid for it; or rather, that it should give the city the same privileges given to individuals generally. If that were the object of the Legislature it succeeded unusually well in concealing it from the reader of the Act. The language of the

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law makes it compulsory upon the plaintiff to furnish a certain amount of gas to the city, and that absolutely and not upon any condition. There is no proviso that none shall be furnished if the city does not pay for it. If payment by the city was contemplated, the Legislature would doubtless have left it within the power of the plaintiff to refuse furnishing the gas, if the city refused to pay for it. Instead of that, however, it is made compulsory on the plaintiff absolutely to furnish it for the period of ten years.

The duty imposed upon the plaintiff is absolute, and there is nothing in the Act which will justify this Court in making the act to be done by it dependent upon a condition. If the construction placed upon the sixth section of the Act by counsel for plaintiff be correct, it accomplishes nothing whatever; for it is to be presumed the plaintiff would, if profitable to itself, furnish the defendant with whatever gas it might need, without any legislative Act compelling it to do so. And if payment by the city were a condition upon which it is to be furnished, then it is clear the plaintiff could impose upon the city an exorbitant charge, and if not paid, could refuse to furnish the gas. Thus it would, after all, be placed in the power of the plaintiff to furnish the city with gas or not as it might choose, and so the sixth section of the Act in question would give the city of Virginia no advantage whatever, and would practically amount to nothing. Unquestionably the incorporation of section six into the Act was for some beneficial object; but if the construction of counsel for the plaintiff be accepted, we must conclude either that the Legislature had no object whatever in adopting that section, or that it totally failed in making it known. It is the duty of Courts, if possible, to place upon the Acts of the Legislature such construction as will give them beneficial and practical effect, rather than to nullify or make them of no practical utility by an unnatural interpretation of the language. We conclude it was the object of the Legislature to compel the plaintiff to supply the quantity of gas mentioned in the Act to the city of Virginia, free of charge; and the gas having been furnished to the defendant in compliance with a duty imposed by the Legislature, on promise by the defendant to pay for any advantage it might have acquired by the performance of such duty can be implied, nor indeed would the per-

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formance of such duty be sufficient to support even an express promise by the city.

The next question to be determined is whether the plaintiff furnished the city with any quantity of gas in excess of that which the law made it incumbent on it to furnish. If so, it is entitled to recover from the defendant its fair value. The Judge below finds that over one hundred thousand feet were so furnished, and that such excess was reasonably worth the sum of fifteen hundred and twelve dollars. In arriving at this conclusion the Judge assumed that the first year, (during which time the plaintiff was required to furnish gas sufficient for five burners) commenced on the eighteenth day of December, A.D. 1864. That was probably the time when the plaintiff began to supply the gas to the city. Though the works for the manufacture of the gas are required to be finished by the first day of June, A.D. 1864, yet no exact day is fixed when the gas should be furnished to the city. It is evident all the works necessary for manufacturing it might be completed by the first day of June, whilst by reason of the pipes not being laid through the city, it could not be supplied for some time afterwards.

The laying of the pipes through the city cannot be considered a part of the *works* for the *manufacture* of gas. Hence, after the first of June, when the works were required to be completed, the plaintiff had a reasonable period of time within which to lay the pipes necessary to supply the city. When an act is required to be done, and no time is fixed, the law requires it to be done within a reasonable time, all the circumstances being considered. From the first of June to the eighteenth of December may not have been unreasonable time to allow the plaintiff to lay its necessary pipes.

On the eighteenth day of December, A.D. 1864, then the first year commenced. During that year the law only required the plaintiff to supply five burners for the city, whilst the Court finds that it furnished ten. So double the quantity which the law made it the duty of the plaintiff to supply was furnished during the first year, and the Court below finds the excess thus furnished was reasonably worth the sum of fifteen hundred and twelve dollars.

The judgment being in accordance with the findings, must be affirmed. Costs here must be equally divided between the parties.

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By JOHNSON, J.

I think it apparent, upon a consideration of the Legislative Acts under which plaintiff claims its charter privileges, that it is compelled to furnish Virginia City with illuminating gas *free of charge*, to the extent, for the time, and for the uses specified in section six of the Act referred to. The *privileges* accorded to this company, of supplying Virginia City and its inhabitants with illuminating gas, are contained in section two; whereas section six makes it compulsory on the company to *provide* the city with sufficient gas for use on the public streets; for the first year to supply five, the second year ten, and each succeeding year thereafter, during the existence of the charter, for fifteen burners. The same section requires "the corporate authorities to *provide* the lamps, burners, and lamp posts." The learned counsel for plaintiff maintains "that the aforesaid section only renders it compulsory on the company to furnish the gas to the city, but in no degree exempts the city from an implied obligation to pay the company for it." I interpret the law differently, and propose briefly to consider some reasons which determine my judgment on this controverted point.

In the first place we observe the Act does not, in express words, declare that the company shall *provide* gas for the public use *without pay*, nor that the city shall in any degree be supplied with gas *free of charge*. Hence, the exemption claimed by the corporate authorities of Virginia City rests solely on an implied agreement of the original contracting parties—the Legislature granting the franchise and the beneficiaries named in the grant; and therefore we must look to the entire Act and the circumstances under which it was passed to ascertain the probable intention of these parties in this regard. We have seen that the Act requires the company "to *provide* gas," and the city authorities "to *provide* lamps, burners, and lamp posts." None will dispute but that the words "provide," in connection with the city, is but another mode of expressing that "the city authorities must furnish lamps, etc., at the expense of the city." If such is the meaning of the words in the one instance, can any plausible pretext even be found for using the same words in a contrary and opposing sense in respect to the thing compelled

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of the company? I think not, and the only rational conclusion is, that when the Act declares that the company shall *provide* a given quantity of gas, it shall be at the expense of the company and not of the city.

The right of the city to exact this service, and the corresponding duty of the company to perform it, depend on one condition only—that the Gas Company shall not be burdened with the cost of supplying either lamps, burners, or lamp posts, and the legislative reservation in favor of the city is coupled with the condition that the expenses of these are to be borne by the city. “The one thing being expressed excludes all others.” When the law has in effect declared that the city shall pay certain specific items of expense necessary to secure to the public the benefit of lighted streets, it clearly excludes the presumption that it shall furthermore be held liable to pay for the gas *provided* by the company.

Again: if it was the intention of the parties to this compact that the company should be compelled to furnish the city with gas, on the further condition that the city should pay for it, why is any quantity specified, or a limit fixed to this supply—at least, to so inconsiderable an amount—and especially, why is this limit enlarged at stated periods so that ultimately the quantity to be furnished is increased to three-fold that of the first year? It occurs to me that the only theory upon which the full extent of plaintiff’s claim can be conceded and made consistent with this feature of the Act is, that the Gas Company might not be compelled to provide a supply for the city beyond the productive capacity of its works, a theory scarcely reconcilable with our impressions of such establishments in populous cities. A more probable explanation of the reasons why these limitations were introduced in the body of the Act accords with our construction of it, and may be summed up in about this way. Here was a valuable franchise within the granting powers of the Legislature. It is bestowed on this company and made exclusive, so that the grantees cannot be molested by any rival enterprise. The city and its people for ten years are compelled to rely on this company for their supplies of illuminating gas; the public streets are to be disturbed in the process of laying gas pipes; and as compensating in some degree for the rights and privileges acquired by

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the company, the Legislature compels it to furnish the city on which it has imposed this monopoly, illuminating gas for public use, but with the understanding that it is to be supplied *without charge*, the allowance is restricted within certain limits; and also considering the obstacles which such enterprises ordinarily have to encounter in their beginning, the quantity for the first year is limited to the very small amount specified in the Act. But when the expected advance of the city in population and improvement, by the natural course of things, has enhanced the demand for its use and consequently the resulting profits, the *bonus* is advanced with the enlarged facilities and resources of the company.

But the learned counsel for the plaintiff seems to ascribe some importance to the fact that at the same session of the Legislature two other franchises for similar purposes in other cities of the Territory were granted, in each of which there was contained a special clause, that a given quantity of gas was to be supplied to the cities named "*free of cost*," and concludes from this circumstance that if the Legislature meant to compel the plaintiff to furnish gas to Virginia City *free of cost*, it would have been expressly declared in this, as in the other charters. Because the Legislature has adopted more formal and precise language in the later Acts, perhaps *ex industria*, to silence all doubt, we are not to conclude that the omission of these words in the first mentioned Act establishes a contrary intention; but the question at issue must be determined the same as if no other franchise of this character had been granted by the Legislature. If, however, the position of counsel for plaintiff be correct, it evidences this remarkable fact, that the most valuable charter, the one granted plaintiff, is made in all material respects *unconditional*; whilst the others, of infinitely less value, are cumbered and burthened with exactions—an inconsistency and favoritism rarely discernable even in a Territorial grant of a private franchise.

The matters embraced in the second and remaining question discussed at the hearing of this appeal involve the ascertainment of but a single fact, as to when "the first year" began, in the sense and meaning the expression is used in the Act; because such date, when fixed, regulates the measure of all subsequent supplies of gas

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which the city can claim for public uses, free of cost; and from thence must be determined in what degree the quantity furnished the city has exceeded the amount it was lawfully entitled to without charge.

Here it may be stated that this is an appeal from the judgment only, and consequently none of the testimony adduced on the trial below is before us; and as the District Court has restricted its findings to but a portion of the facts which now properly should be made to appear, we are uninstructed on some questions which in my judgment were pertinent matters of inquiry; and indeed from the record as it comes to us, it is somewhat difficult to arrive at a satisfactory conclusion concerning this feature of the case. For instance, it would seem consistent with the issues made by the pleadings, to have determined when the works of the Gas Company were completed, when supply pipes were laid connecting the gas works proper with that portion of the city to be supplied, and finally when the city authorities were in a condition, with lamp posts, lamps and burners, to have the streets of the city lighted with gas. Upon most if not all of these points, it is reasonable to conclude that proofs were before the Court below; but none of these collateral facts are distinctly passed upon by the findings, and in some respects it is left to conjecture the basis upon which the Court below founded its judgment. In this condition of the case, let us for a moment recur to the statutes already cited.

By the terms of Sec. 2 the charter of plaintiff runs ten years from the 28th of November, 1861—the date of its approval. Sec. 4 requires the grantees named in the Act to organize under the general incorporation laws of the Territory within *three months*. By amendments to Sec. 5 of the original Act (see Acts 1862, pp. 15, 16) the company is required “to commence the completion of the works necessary for the manufacture or production of gas” by the *twelfth of June, 1863*, and “to complete the same *on or before the first day of June, 1864*.” Sec. 6, as already shown, specifies the quantity of gas to be supplied for public use within a stated period, commencing with “the first year”; but nowhere in the Act is a day or an event stated from whence shall be computed the commencement of such “first year.” Wherefore we must determ-

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ine the intended meaning of the phrase so used in this connection. Plaintiff insists that the "first year" spoken of manifestly refers to the year next succeeding the completion of the gas works; and assuming the first of June, 1864, to be the precise day on which the event occurred, by a ready process of reasoning establish their theory as to the point in question. To this proposition my reply is this: In the first place, it clearly appears that the date of June 1st, 1864, was *fixed* for a single purpose, and its use cannot be extended beyond that of marking the extreme limit of time given for the completion of the manufacturing works of the company. It does not even fix a time, except in a relative sense, as the language of the section is "*on or before*" the first of June, 1864; so that the event of completing such works may have happened on *any* day between the passage of the amendatory Act and the limit therein specified. As to the other ground assumed by counsel, that June 1st, 1864, was the true date of the completion of these works, it is sufficient to suggest that neither by the pleadings nor findings of the District Court is this fact shown, and for aught this Court can know, the works were completed prior to that day. However, in the light which I regard this particular point of inquiry, it is quite immaterial whether such was a fact or not. But it is said that inasmuch as the first of June, 1864, is the only date fixed by the Act which with reasonable propriety can be considered for such purpose, we should therefore accept it as the commencement of the "*first year*," as otherwise there cannot be any date ascertained for such purpose. As already observed, this date is used in a relative sense only, is fixed for but a single purpose, and certainly it has but a very remote connection with the question of *time* involved in the supply of gas to the city. The absence of a date fixed by express words may be no serious impediment in determining the commencement of such "*first year*," if some event contemplated by the Act can be made to serve a similar purpose, more especially when, as in this case, the rights of the city are made dependent absolutely on conditions to be performed by the corporate authorities, and the compliance with these conditions not fixed or limited within any given space of time. The condition upon which the city was to derive its gratuitous supply of illuminating gas, com-

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pelled it to provide necessary lamps, etc. Whenever these works of the company were completed, and whether completed or not, after the day limited for such purpose, the rights of the city attached, and the obligation of the company to furnish the stated supply of gas became operative; *provided*, the city was ready with its lamps, lamp posts, and burners. But until this needful provision had been made by the corporate authorities, neither could the public be benefited by lighted streets, nor the gas company be held amenable in any form of proceeding for withholding such bounty; and this condition of things would exist so long as the city neglected to make provision in the respects mentioned. The loss and inconvenience to the city would be measured by the delay and neglect of its own agents. The advantages accruing to the company would also be proportioned to the extent of such delay, for we remember this act limits the duration of the charter to ten years following the approval of it; and as the supply of gas which the city is entitled to after the first two years must equal the demands of fifteen burners as against five burners during the first year, it follows that the period of the greater supply would be diminished in equal degree as to *time*, and threefold as to quantity—the final result depending on the time allowed to elapse before the proper authorities had provided necessary lamps, lamp posts, and burners. It seems to me, therefore, that under the circumstances it is most reasonable to conclude that the Act contemplates “the first year” to be reckoned from the time when the city was prepared to accept the gas from the company for the purposes indicated. The happening of the event, it is true, depended on many contingencies which were incapable of being estimated at the time the Act was passed; but in the progress of events the ascertainment of this fact was not only rendered possible, but indeed as readily determined as any other question which might arise in giving construction to the law.

The facts found show that the company commenced to supply the city with gas in December, 1864; and as no claim is made against the company for not furnishing a sufficient supply for public use prior to this date, we may infer that this was the earliest time the city was conditioned to accept it, and therefore the supply for five

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burners would embrace the twelve months succeeding, to wit: until December, 1865, when the increased supply should begin, and would terminate on the corresponding day of the following December, 1866, after which, and until the expiration of the charter, the *maximum* quantity specified in the Act became the standard of future estimates between the parties in such particular. Guided by the principles herein laid down, it follows, therefore, that the gas consumed for the public use, in excess of a sufficient quantity to supply five burners, between the respective dates in December, 1864, and December, 1865, the city is liable for; and as the findings of fact and judgment of the Court below (except a trivial matter of computation) are in accordance with the principles enunciated in this opinion, I concur in the conclusions attained on both of the points discussed in the opinion of Mr. Justice Lewis, and concur in his affirmance of the judgment.

Dissenting opinion of BEATTY, C. J.

I fully concur with my associates so far as the first point in this case is concerned. I think there can be no reasonable doubt that the Gas Company was bound to furnish the city with a certain amount of gas, as specified in the Act, free of cost.

As to the other branch of the case, I differ entirely from the views expressed by my associates.

The second section of the Act provides that the corporation shall exist for the period of ten years from the *approval* of the Act of incorporation.

The third section confers certain rights and powers on the corporation, such as erecting buildings, works for the manufacture of gas, the right to excavate the streets for laying pipe, etc.

The fourth section prescribes the time within which the company shall organize. The fifth section in the original Act reads as follows:

“The said company shall, within the period of six months from and after the approval of this Act, commence the construction of the works necessary for the manufacture or production of illuminating gas, and shall, within twenty months from and after the approval of this Act, complete the same.”

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Which was afterwards amended so as to read as follows :

“ The said company shall, within the period of six months from and after the approval of this Act, commence the construction of the works necessary for the manufacture or production of illuminating gas, and shall complete the same on or before the first day of June, A.D. 1864.”

The sixth and last section reads as follows :

“ It shall be compulsory on said company to provide said city, or cities, with sufficient gas to supply five (5) burners for the public streets for the first year; for the second year sufficient gas to supply ten (10) burners; and for each year thereafter sufficient gas for fifteen (15) burners; the lamps, burners, and lamp posts to be provided by the proper authorities.”

Although the fifth section of the original and amended Act merely requires the “ works necessary for the manufacture or production of illuminating gas ” to be completed within a given time, and say nothing about the placing of the pipes for its distribution, it is evident to my mind that the Legislature intended that the company should be ready for distribution of the gas when the works were completed. It can hardly be doubted that any company, engaged in erecting costly gas works, would at the same time lay down pipes through some of the principal streets of the city to be supplied, so that as soon as the works were done the supplying of gas might be commenced. It appears to me that it is sufficiently plain that the Legislature intended to require the company to be ready to furnish gas to the city by the first day of June, 1864.

The sixth section requires the Gas Company to furnish gas enough for five burners for the *first year*, *ten burners for the second*, and fifteen for each year thereafter. The question is : What is meant by the *first year*? The charter is granted for ten years after the approval of the Act of incorporation, which was in November, 1861; but the gas works are not required to be done until June 1st, 1864. Now, the first year could not mean the first year after incorporation, because there would be no works ready for manufacturing for more than one year, if the company took the time allowed to complete the works. It appears to me it meant the first year after the works were completed. If this was not the

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time intended, then no definite time is fixed by the statute. It is all left to conjecture and doubt. According to the views of my associates on this subject, whilst the Legislature has carefully provided when the *gas works* shall be finished, it has wholly failed to fix a time when the citizens shall be given the privilege to receive the benefits of the gas. Now, the whole object of fixing the time when the works should be finished was doubtless with a view of securing the citizens the benefit of the gas. I do not think the law is so defectively worded as to have totally failed to attain the end for which it was framed. Whilst the wording of the law is not quite so explicit as it might have been, the intention is apparent and should be carried out.

There is no necessity of holding that the Gas Company should have a reasonable time *after* the completion of their houses, works, etc., for the laying of pipes. They had a reasonable time in which to lay the pipes *before* the works were completed. There was nothing to hinder laying the pipes simultaneously with the building of houses, etc.

If, then, I am correct in holding that the first year, as contemplated by Sec. 6 of the Act, commenced June 1st, 1864, it was the duty of the Gas Company to furnish five burners per night from June 1st, 1864, to June 1st, 1865; from June 1st, 1865, to furnish ten burners for the period of one year. But by the judgment of the Court below the city is made to pay for five extra burners between the first of June, 1865, and the first of December, 1865, although only ten burners were furnished during that time. This is clearly wrong, if I am correct about the time when the first year commenced.

The judgment is for the value of five extra burners for a period of twelve months, whilst, if I am right, it could have been only for five months and thirteen days—say from December 18th to June 1st, at the most.

But I am by no means satisfied that any judgment was proper against the city. The company, as I read the law, was bound to be ready to furnish gas, to the extent of five burners, from the first day of June, 1864, but they only began to furnish it on the eighteenth of December, after near half the year was gone. They

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then furnished double the quantity the law required them to furnish.

Now it would seem, in the absence of all testimony explaining the matter, rather more probable that the company furnished this double quantity in the latter part of the year to make up for their shortcomings in the beginning, than that it was furnished with the expectation that the city would pay for it.

If the company was bound to furnish gas from the first of June, and was not ready to furnish until the eighteenth of December, it was liable to the city in damages. The extra five burners furnished afterwards would have been an offset against this liability. But, on the other hand, if the company was ready to furnish the gas on the first of June, and it was not furnished because the city had not procured the lamps, burners, etc., then the company was not in fault, and would not have been liable to make up for the lost time. The findings are so defective that I cannot determine whether judgment should or should not have been given against the city for the value of the extra five burners, from December 18th, 1864, to June 1st, 1865, but feel satisfied that so far as the allowance is made against the city for the period between June 1st, 1865, and December 18th, 1865, it is erroneous.

I therefore think the judgment should be reversed.

THE BULLION MINING COMPANY, RESPONDENT, v. THE
CÆSUS GOLD AND SILVER MINING
COMPANY, APPELLANT.

Where there is a joint judgment in ejectment against several, a reversal as to one of the defendants necessarily reverses it as to all.

An erroneous judgment may become valid and binding by lapse of time. No Appellate Court will take any active or positive steps to affirm such judgment.

An Appellate Court certainly has the power to reverse an erroneous judgment rather than to modify it. If an order is made reversing a judgment, the term expires and the remittitur is sent to the Court below, it is then too late to ask this Court to change its order so as to modify the judgment of the Court below, rather than to make it an unqualified reversal.

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This was a motion made in this Court, asking that a certain judgment of reversal, entered several terms back, might be so amended as to make the reversal only affect the party who took and prosecuted the appeal. The facts of the case are stated in the opinion.

D. Bixler, for the Motion.

Only the party aggrieved can appeal, and then only from that part of the judgment wherein he is aggrieved. (Sec. 273, Practice Act; Sec. 325, N. Y. Code; Voorhies Code, 461; *Cuyler v. Moreland*, 6 Paige, 273; *Idley v. Bowen*, 11 Wend. 227; *Steele v. White*, 2 Paige, 481; *Reid v. Vanderheyden*, 5 Cow. 719.)

Any one of several parties considering himself aggrieved by the judgment may appeal, whether his coplaintiffs or codefendants join in the appeal or not. (*Matthieson v. Jones*, 9 How. P. R. 152.)

In an action of tort, and judgment against two or more, if one only appeals the judgment should be reversed as to the appellant only. (Sec. 283 of Practice Act, and *Geraud v. Stagy*, 10 How. P. R. 369; also, *Wilson v. Moore*, 2 Dutcher, N. J., 458.) A several judgment might have been taken in the Court below as to the Croesus Company, and no right of contribution exists. Therefore no injury could result from a partial reversal of the judgment. No right of either appellant or respondent would be lost thereby, and the Court only has to deal with them.

The Croesus Company occupied a distinct portion of the mine, whilst the other defendants occupied the other portions. There might have been a several judgment against the Croesus Company for the part occupied by it. How does it injure that company to let that judgment stand against the others who do not complain and have not appealed?

Aldrich & DeLong, in opposition to the Motion.

This motion cannot be sustained.

For the reason that there is no clerical error in the judgment, nor any error in the form, in which cases alone the Court has virtually decided it will take back and reverse a judgment. (*Sparrow & Trench v. Strong et al.*, 2 Nev. 364.)

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For the reason that the remittitur from the Court having been issued and sent to the Court below, this Court thereby lost all jurisdiction over this action, and there is in fact no case here. (1 Cal. 194; 1 Comstock, 240; Ib. 241; 7 Hill, 591; and *Ma-teer v. Brown*, 1 Cal. 281.)

For the reason that the judgment in the cause is correct as it is, and it would be erroneous in this Court to amend it as requested to do.

The rule is well settled that an entire judgment against several defendants, whether in an action of tort or upon a contract, cannot be reversed as to one defendant, and affirmed as to others. (*Farrel v. Calkins*, 10 Barb. 349, and authorities cited in the opinion; *Sheldon v. Quinlan*, 5 Hill, 441, and authorities there cited.)

A several judgment in this action would not have been proper, because there is nothing in the complaint to show that the several defendants occupied and claimed several and distinct portions.

We refer to the following authorities in 20 U. S. Digest, 593, Sec. 562, where it is said: "Where judgment is right as to one party, but wrong as to the others who were sureties, it was held that it could not be set aside as to them, and affirmed as to him; but there must be a general reversal and a new trial," citing *Dra-per v. State*, 1 Head. Tenn. 262; also on page 569 is the follow-ing: "In an action of right the judgment is an entirety, and if reversed as to one defendant it must be to all," citing *Cavender v. Smith*, 5 Clark, Iowa, 157.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

At the July term of this Court in the year 1866 this case was decided, reversing the judgment of the Court below, and sending the case back for further proceedings. (See 2 Nevada Reports, 168.) Now at this time the respondent moves the Court so to modify the judgment as to reverse it only as to the appellant, the Ceresus G. & S. Mining Co., and to let the judgment stand as to the Minerva Company, which was one of the defendants, but which did not join with the Ceresus Company in taking an appeal.

The judgment was joint in form against the Ceresus, the Minerva,

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and the Superior Companies. The Croesus Company alone gave notice of appeal, and prosecuted the same in this Court. It is therefore contended that as the other two defendants did not appeal, the judgment should stand good as to them. It was undoubtedly the former rule that the reversal of such a judgment as to one defendant would destroy its validity as to all. (See *Farrel v. Calkins*, 10 Barb. 349; *Sheldon v. Quinlan*, 5 Hill, 44.)

But in the case of *Geraud v. Stagg*, 10 Howard Practice Reports, 369, the New York Court of Common Pleas held that where there was an entire judgment against two in an action for libel, and one only of the defendants appealed, the Appellate Court might reverse the judgment as to appellant, and leave it standing as to the other party. This decision is admitted to be in conflict with the general current of former decisions, but is based on and justified by the peculiar language of the code. In the case of *Farrel v. Calkins*, 10. Barb. 349, decided in the Supreme Court, it appears from a note of the reporter that the attention of the Court was called, in a petition for rehearing, to this peculiar language of the code, and the Court still adhered to its former opinion: that where there was an entire judgment against several, a reversal as to one would necessarily reverse the judgment as to all. So there is a conflict of authority among the New York Courts as to whether, under any circumstances, an Appellate Court can reverse a judgment as to one of several defendants, and leave it good as to the others. The point has never been decided by the Court of Appeals in that State, so far as we are aware. But conceding that the Court of Common Pleas was right in the case of *Geraud v. Stagg*, is this a case to which the rule would apply? The language of the New York code and our Practice Act is similar, and the same construction should be given to both. In this case the Bullion Company is plaintiff, charging that several defendants occupy certain real estate claimed by plaintiff. The judgment is joint against all. Now, how is it possible to let such a judgment stand as to part of the defendants and be reversed as to another? If a plaintiff has judgment in ejectment, or, in our action for the recovery of real estate, which is analogous to the action of ejectment, the judgment is that he have possession of the

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real estate sued for, and execution for his costs. If there be several defendants, and the plaintiff have judgment against a part of them for the whole of the land sued for, and the other defendants have judgment for their costs, this judgment would indicate that plaintiff was entitled to all the land, but that he had sued some defendants who were not in possession of or trespassing on the land in controversy. Probably such a judgment would only be justified in those cases where part of the defendants in such action should disclaim all interest in or possession of the land sued for. If this judgment were to be made good as to all the defendants except the Croesus Company, the effect would be that, under an execution against the other defendants, the Croesus Company would be turned out of possession of property which it claims as its own, and which this Court held has never been properly recovered from it.

But, says the petitioner, the judgment in this case might have been different. It might have been against the Croesus Company for that part of the property which was claimed by that corporation, a separate judgment against the Minerva for what was claimed by that company, and so on as to each company claiming a separate portion of the property sued for. This is perhaps true; and if such several judgments had been entered up against the several companies claiming distinct portions of the property sued for, and only a joint judgment for costs against all the defendants, then we are inclined to think it might have been very proper to reverse that portion of the judgment which related to the property specially claimed by the appellant, the Croesus Company; reversed also the judgment for costs so far as the Croesus Company was affected thereby; and left the other portions of the judgment standing. But the judgment for the property being jointly against all, the reversal as to one necessarily reverses it as to all.

It may be suggested that this Court might have modified the judgment in the Court below so as to have made it a good judgment for all the property in dispute except that claimed by the Croesus Company. This we think would have been manifestly improper. The judgment could only have been modified by setting it aside, and directing the Court below to enter several judgments against the several defendants, other than the Croesus

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Company, for the several portions claimed by each. Such an order might be made under proper circumstances. But in this case the Court held that plaintiff had no right to a judgment against any of the defendants. It would hardly then order an erroneous judgment to be set aside and several others equally erroneous to be entered in its place. An erroneous judgment may become final and effective against a party by his negligence in failing to take an appeal. But no Appellate Court will take any active or positive steps to affirm such judgment. If affirmed, it must be by lapse of time, and not by positive action of the Court.

But there is still another and fatal objection to granting this motion. Several terms of the Court have elapsed since the case was decided. The remittitur went from this Court long since. There is no question but that the Clerk entered up the judgment as directed by the Court. There is no doubt but that if there was error in the proceedings of the Court below, as we have decided, this Court had the power and discretion to reverse the entire judgment as to all the parties, rather than to modify it or only give judgment for a partial reversal. Then having decided to reverse the judgment in whole, and not as to one of the defendants only, it is too late now to ask for a modification of that judgment.

JOHNSON, J., having been counsel in this case, does not participate in this decision.

**SAMUEL C. WRIGHT, APPELLANT, v. JOHN CRADLE-
BAUGH, RESPONDENT.**

Where an assessment is made of the value of a town lot, it implies the total value, and not the mere value of a possessory claim.

Where other language is used in the tabular forms furnished to the assessors, indicating that only the possessory right is valued, the language first used may be qualified by this latter phrase; but in the absence of qualifying language, the value with a fee simple title will be understood.

Where the fee in United States land is assessed for taxes, the assessment is utterly void.

Two contiguous lots owned by the same individual may be jointly assessed, and only one valuation fixed for the two lots.

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"Due process of law" requires that a party shall be properly brought into Court, and when there, shall have a right to set up any lawful defense to any proceeding against him. The Legislature, under pretense of regulating pleading cannot deprive a party of substantial rights.

There was no necessity for describing these lots by metes and bounds, nor of giving the number of acres, for several reasons. First: Carson is called a city, in the Constitution, the statute laws of the State and by common consent. It may therefore be held a city under the provisions of the revenue in regard to city lots. Second: to describe a lot by its number of lot and block in a regularly laid out town, (whether a city or not) is describing it by its common designation or name.

A tax deed which purports to convey the entire fee of the United States land, unaccompanied with any proof that any one ever had a possessory claim on the land, could convey nothing, and was therefore properly rejected by the Court below.

Counsel have the privilege of choosing the order in which they will introduce their proofs. But if documentary evidence is offered, which can only become relevant by the introduction of other connecting proofs, the Court may well refuse to receive such evidence until counsel will at least assert that they expect to introduce the connecting evidence.

One having a Government title may set it up against one claiming under a tax sale made previous to the time when Government parted with its title, notwithstanding any statutory provisions as to the effect of tax sales.

Per JOHNSON, J.—The Assessor used apt and appropriate language to describe the property assessed. The description does not necessarily imply that the fee simple title was assessed. The Assessor is not bound to ascertain the title by which a party holds lands. There was no defect in the assessment so far as the title to the land is concerned.

The law requires each city lot to be assessed separately, and a joint assessment of one lot and a fraction is void. This interpretation of the law is strengthened by the fact that it was so interpreted by the highest Court of California before we copied it from the statutes into our laws. A tax sale in pursuance of such assessment is void.

The Act of the Legislature declaring that "the deed derived from the sale of real property" shall be "conclusive in evidence of title," is of doubtful validity; but even if binding, it cannot be held to mean more than that the recitals of the deed shall be conclusive: not to be contradicted by other evidence. If the deed shows on its face that the assessment was illegal and void, it can convey no title.

UPON REHEARING.—Taxing or assessing a piece of property in general terms is taxing or assessing its whole value, and not the value of a particular interest or estate carved out of the whole.

When the title of real estate has passed from the Government, the Assessor only has to ascertain the total value, and the whole land is bound for the tax. If the estate is divided among several, the interest of each may be assessed separately, or the entire interest may be assessed in gross. But if the title is in

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the Government, the only thing liable to assessment is the possessory right—in other words, the value of the land less the price to be paid the Government. An assessment of the gross value of Government land makes it absolutely void. The second column in the Assessor's table should distinctly state when only the possessory claim is assessed. But where that fails to make the proper statement, possibly the proper entry in the seventh column might correct the omission in the second.

R. M. Clarke and Samuel C. Denson, for Appellant.

Geo. A. Nourse, for Respondent.

The question here is, who had the right of possession to the lots in controversy, when the town site was entered?

None but an actual occupant, or one deriving his title from an occupant, could lay claim to these lots. What acts are necessary to constitute an occupancy, must be determined by the settled adjudication of the State.

The occupancy of the lot by Cradlebaugh in 1865, and his continued possession for some time, even up to the time of entry by the trustee, is clearly proved.

This being a *prima facie* case, can only be overcome by proof of some prior occupancy, or proof that he occupied in subordination to some other person. Does the rejected testimony tend to prove anything of the kind?

Appellant only offered in evidence a tax assessment of this property to J. C. Lewis, a return of delinquent tax, a suit thereon, a judgment for the State, execution sale, and tax deed. This evidence was objected to on three grounds; but if inadmissible on any grounds, this Court will not reverse the judgment on account of its exclusion. (*Ludlow's Heirs v. Park*, 4 Ham. Ohio Rep. 39; G. & W. on New Trials, Vol. 1, 256; 2 Ib. 673.)

The tax deed introduced could have availed nothing, for it is admitted by both sides that the *fee* of the land was in the United States long after the taxation and sale of the lots. This title is by law exempt from taxes, and therefore a sale of the same would be void.

There could be nothing taxable but a possessory title, and there is no presumption of law that such possessory title ever existed.

The presumption of law is, that it was United States land. (See

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Laws of 1864-5, 344, Sec. 7.) Until a possessory title was shown to exist, what good would a tax deed do? Appellant made no offer to connect his deed with an existing possessory right. (*Comstock v. Smith*, 23 Maine, 202; *Bohr v. Steamboat Baton Rouge*, 7 Smedes & Marshall, 715; *Allen v. Blunt*, 2 W. & M. Rep. 121; *Crease v. Barrett*, 16 M. & R. 919, cited in G. & W. on New Trials, Vol. 2, 672-3-4.)

“Where evidence has been improperly rejected the Court will grant a new trial, *unless with the addition of the rejected evidence a verdict given for the party offering it would be clearly and manifestly against the weight of evidence.*”

If this evidence were admitted, even then, would not a verdict in Wright's favor be “clearly and manifestly against the weight of evidence?”

Certainly the tax proceeding against John C. Lewis could pass no greater title than a deed from John C. Lewis. What would a deed from him be worth, until it be shown that he had a title to convey?

A tax deed could amount to nothing until it was shown Lewis had a title to pass by that deed.

The assessment was void on its face, because it purports to tax the fee. (*Hale & Norcross Co. v. Storey County*, 1 Nev. 109; *Hall v. Dowling*, 18 Cal. 619; *People v. Morrison*, 22 Ib. 79.)

The assessment is void, because two several pieces of land are valued in one gross assessment. (*Terrill v. Groves*, 18 Cal. 151; *Shimmin v. Inman*, 26 Maine, 228; *Whitman v. Thomas*, 23 N. Y. 281.)

A tax title is only conclusive against parties to the action or their privies. Neither the State nor National Constitution will allow Cradlebaugh to be deprived of his property by a proceeding against Lewis.

He can only be deprived of his property by due process of law. (U. States Const., Article XI of Amendments; Const. of Nevada, Art. I, Sec. 8.)

The Appeal must be dismissed, because the evidence does not appear in the record, which is required in this class of cases. (Laws of 1867, Sec. 5.)

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Opinion by BEATTY, C. J., LEWIS, J., concurring, and JOHNSON, J., concurring specially.

This was a proceeding under the provisions of an Act approved January 31st, 1866, "prescribing rules and regulations for the execution of the trust arising under the Act of Congress, entitled 'An Act for the relief of citizens of towns upon lands of the United States under certain circumstances,' approved May 24th, 1844."

Each party filed a claim for the same piece of property, and demanded a deed therefor from the District Judge of the Second Judicial District. The case came on for trial before the District Court of the Second Judicial District, Ormsby County, the Hon. C. N. HARRIS, Judge of the Third Judicial District, presiding.

When the appellant undertook to prove his case, he first introduced the delinquent list of Ormsby County, and offered in evidence the following portion thereof:

Taxpayers' Names.	Description of Property.	No. of Lot.	No. of Block.	Section.	Real Estate, No. of Acres.	Possessory Claim, No. of Acres.	Value Real Estate or Possessory or Possessory and Improvements thereon.
J. C. Lewis.	{ Lot 1, and E. 20 feet; Lot 2, and improvements, S. T. & S. Division, C. C. }	1 & 2	17	\$600 00

The other claimant, John Cradlebaugh, objected to this evidence on the following grounds:

1. "That it appeared from said assessment that separate, several and distinct lots or parcels of land were assessed together and not separately valued.

2. "That from said assessment and valuation it appeared that the absolute or Government title to said land was assessed for taxation, and not the 'possessory claim.'"

The Court sustained this objection and Wright excepted. It is proper to remark that, in connection with the offer of this part of

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the delinquent list of Ormsby County in evidence by Wright, Cradlebaugh admitted "that all the proceedings in the action in which the judgment was rendered, upon which the deed hereinafter set forth is based, were legal and sufficient as between the parties thereto."

The Court, after argument, rejected the delinquent assessment list, or the extract therefrom, and of this the appellant complains in this Court.

Whether, under our statute, it is necessary to introduce the delinquent assessment list and the judgment rendered for delinquent taxes, as a preliminary to the introduction of a tax deed, it is not perhaps necessary in this case to decide. But assuming that they must be so introduced, let us examine the objections to the introduction of this delinquent list.

In the first place, it is admitted by the petitions of each of the parties filed in this case, that the land in controversy was United States Government land up to the seventh day of September, 1866, and as such it was absolutely free from all State taxation, and any proceeding taken on the part of the State Government to subject it to taxation must be held utterly void. But the Government has adopted the policy of throwing open her lands to settlement and occupation by her citizens generally, and has recognized the right of all such settlers to purchase the Government title under prescribed rules. Now although the Government title may be free from taxation, it by no means follows that the possessory right of the occupant is also free. Indeed, it has been repeatedly held in this and neighboring States that such possessory rights are subject to taxation. (See *Hale & Norcross Gold and Silver Mining Co. v. Storey County*, 1 Nevada, 104.)

In some cases the Government policy has been to discourage and prohibit transfers of possessory claims, and always to grant the land to the original occupants regardless of any forced sales of the occupants' rights. But we are not prepared to say such has been the policy of the Government in regard to town site property. Possibly a tax sale of the possessory right of a party to a town lot, and a deed regularly made under such sale, might confer on the purchaser the right of possession, and entitle him to a deed from the

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trustee. But however that may be, in this case the assessment is not of a possessory right. The assessment is of one town lot and the fraction of another. This assessment implies that it was the entire or fee simple title, and not merely the possessory title, which was assessed. The tabular headings used in this case are those prescribed by the statute. In one line it reads "Real Estate, No. of Acres;" in another, "Possessory Claim, No. of Acres." These headings, in view of other portions of the statute, seem to have been badly selected, for "real estate" includes "possessory claims," according to the definitions of the statute. Here, however, they were used to express two separate and distinct classes of property. Real estate in this place undoubtedly is intended for fee simple title, in contradistinction from the mere possessory title described in the other column. Had, then, the number of acres, or fractions of an acre contained in these two lots been entered in the appropriate column, say under the head "Possessory Claim, No. of Acres," this might have been sufficient to show that only the possessory claim was assessed. But nothing of the kind appears. We must then give to the words used by the Assessor their natural import, and hold that he made an assessment of the whole estate in the land, and the fee being admitted to be in the United States, the assessment must be held void.

It would certainly always be safe for the Assessor in assessing possessory claims to describe them as such in the second column of the tabular form prescribed by statute.

We think for the foregoing reasons the Court did not err in rejecting this testimony.

It may not be out of place to notice some other objections raised to this delinquent list. It appears that one lot and a fraction were assessed in one common assessment, and a joint valuation made of both. The whole lot is only described by its number and block, the fraction as so many feet of the east side of another lot.

Two objections are raised to this mode of assessment. First, the lot and fraction should not have been assessed jointly. Second, these lots not being in a city or incorporated town should have the boundary described, and the number of acres or fractions of an acre should have been mentioned. The requirements of the statute

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in this respect are as follows: "Described by metes and bounds or by common designation or names; if situated within the limits of any city or incorporated town, described by lots or fractions of lots; if without said limits, giving the number of acres as near as can be conveniently ascertained, and the location and township where situated."

We see nothing in this which in direct language prohibits the joint assessment of two contiguous lots to the same person. We see no possible objection to such assessment. If both lots belong to the same party, he is bound to the State for the entire tax, and has no right to complain that he cannot pay the tax on one without paying the tax on both. If the same party owns both lots, any property of which he may be possessed, real or personal, is bound for the whole tax. He cannot be injured by the failure to make a separate assessment. If two lots are assessed jointly, and one belongs to A and the other to B, we can see that a difficulty might arise about the payment of taxes. A might wish to pay on his, but not on B's lot. They might not necessarily be of the same value, and the receiver of taxes would have no right to assess the value of each. But the very same difficulty would arise if a single lot were assessed to A and half of the lot belonged to B. The two halves would not necessarily be of the same value. The receiver of taxes has no right to establish the value or amount of taxes on any piece of property. The law seems to have made no provision for a case of this kind. If A were sued for the entire tax on a lot, and should set up in defense that he only owned one half of the lot, a question might arise whether the Court could apportion the tax and give judgment for his equitable portion, or whether it would be a good defense to the entire action. But it is surely true that the defense would be just as available in a case where A owned only one half of a lot, as in a case where two contiguous lots were taxed to him and he only owned one of them.

We are aware that in coming to the conclusion that two lots may be lawfully assessed in one joint assessment, we are disregarding and overruling some respectable authorities. (See *Terrill v. Grove*, 18 Cal. 151; and *Shimmin v. Inman*, 26 Maine, 228.) But both these authorities go on the ground of the great inconvenience that

might arise to a party from having his lot assessed jointly with some other person's lot. The same inconvenience, as we have shown, would arise if the half of one man's lot was assessed with the half of another's lot. If every method of assessment is to be held void which in certain supposed cases might produce inconvenience or injustice, it would probably be impossible to adopt any method by which assessments could be made valid, or by which the payment of taxes could be enforced. When we suggested that a party to whom a lot was assessed might set up, by way of defense to the tax suit, that he only owned one half thereof, we did not overlook the fact that such a defense is not included within either of the five answers which Section 32 of the Revenue Act of 1864-5 says may be made by a defendant in a tax suit.

We apprehend it is beyond the power of the Legislature to restrain a defendant in any suit from setting up a good defense to an action against him. The Legislature could not directly take the property of A to pay the taxes of B. Neither can it indirectly do so by depriving A of setting up in his answer that his separate property has been jointly assessed with that of B, and asserting his right to pay his own taxes without being incumbered with those of B.

Section 8 of the first Article of the Constitution declares that "No person shall * * * nor be deprived of life, liberty or property without due process of law."

"Due process of law" not only requires that a party shall be properly brought into Court, but that he shall have the opportunity when in Court to establish any fact which, according to the usages of the common law or the provisions of the Constitution, would be a protection to himself or property. The Legislature may regulate the mode of pleading and conducting a trial, but under pretense of doing so it cannot deprive parties of substantial rights. (See *Taylor v. Porter & Ford*, 4 Hill, 140.)

With regard to the other objection, that the boundaries or number of acres is not given, we think there is nothing in that, for several reasons. In the first place, we think Carson is a city. It may not be incorporated, but that we think does not prevent its being a city. On all the maps of the country it is marked as a city; it is generally known as a city; it is called a city in that

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clause of the Constitution which adopts it as the seat of Government, and in several legislative acts it is called a city. We know of no reason why we should say it is not a city. If we go to the books for a definition of a city, we scarcely find any two of them agreeing on what is a city. We are content to call that a city which is so called by the Constitution and statutory laws of the State. Even if Carson were not a city, it is a place laid off into squares and lots. When you describe a lot by the number of the lot and the number of the block in which it is situated, that is describing it "by common designation or name." That portion of the direction which requires the number of acres to be given, we think was hardly intended to apply to lots containing only a small fraction of an acre. Possibly it might be safer for the Assessor in such case to say "a fraction of an acre," under the proper head. This would prevent all cavil.

The tax deed was afterwards offered in evidence by Wright, and objected to on the same grounds as the delinquent assessment list, and also, among other grounds, that "no evidence was offered in the case showing or tending to show that the lot and fraction of lot in question, or either of them, was claimed or occupied by any person at the time of the assessment or valuation thereof, or of the levy of the tax under which the sale mentioned in said deed purports to have been made; nor that John C. Lewis, in said assessment and deed mentioned, ever had any title or claim to said real estate, or any portion thereof." The deed itself recites that the land or property therein described (not a mere possessory right thereto) was sold for taxes, and purports to grant a title thereto. There is no proof or offer to prove that any person ever had a possessory right thereto at or before the time of the levy of the tax. Both parties admit that at that very time the title was in the Government. Under all these circumstances, we think the Court below was right in holding that the deed proved nothing for Wright, and in rejecting it.

It is claimed by appellant that the deed itself was at least good testimony as far as it went; that he should have been allowed to introduce his evidence in whatever order he chose; that he might subsequently have shown that Lewis did have a possessory right and

that Cradlebaugh held under Lewis, or any other facts that would have aided the deed.

It is true that a party may usually choose for himself as to the order in which he will introduce his testimony. But if counsel offers a paper in evidence which may or may not be pertinent to the issue, depending for its relevancy upon its being in some way connected with something else, the Court may well ask the counsel if he expects to make the connection which would make it relevant testimony.

If counsel answers in the affirmative, it would usually be proper to admit the writing, though there are some cases where the Court might with propriety require the connecting proof to be first made. But if the affirmative answer is not made, then the Court should reject the paper, for the time being at least.

Here the opposing counsel called attention to the total absence of all that proof which would be required to make the deed relevant to the issues in the case. There was no suggestion by the appellant (so far as the record shows) that such proof would be offered, and no subsequent attempt to introduce such connecting evidence. Under such circumstances it was not improper in the Court below to reject the deed.

Even had this evidence been offered, we do not see that it would have helped the appellant. There was still the stubborn fact apparent on the face of the deed that the land itself was taxed, and the deed purported to convey a fee simple title to this land. The appellant only claims the benefit of this proceeding on the hypothesis that it was United States land when the tax was assessed. If so, we think that a deed based upon a supposed taxation and sale of that which was neither subject to taxation nor sale by State authority must have been held void, whatever other proof may have been connected therewith. That clause of the Revenue Law which declares that a tax deed shall be "conclusive evidence of the title," except against frauds, etc., is certainly very sweeping, and no doubt was intended to cut off many defenses that it was anticipated might be made against those claiming under tax deeds. Whatever was the intention of the Legislature, there are certainly some defenses they could not cut off. If the Government lands cannot be taxed by the

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State, (and no one contends that they can be under our State Constitution, to say nothing of the rights of the Government itself) then it is certain that one holding a Government title may set up and assert that title against any tax sale which took place whilst the title was in the Government.

The judgment of the Court below must be affirmed.

Opinion by JOHNSON, J.

The facts of this case and points submitted for our determination are fully stated in the foregoing opinion, and whilst I concur with my associates in the judgment they award, it will be seen that in some respects we differ as to the reasons therefor. The case arising in the District Court under the town site laws of this State, was brought into this Court not strictly in compliance with the acts governing appeals in such special proceedings, but at the instance of counsel representing each party, the appeal was permitted to be heard on an incomplete record, the bill of exceptions alone; so that the only questions reserved for our decision are as to the rulings of the Court below in rejecting the delinquent assessment roll and tax deed as evidence on behalf of plaintiff. This brings us directly to consider material and important features of the Revenue Laws of the State, and in doing this, two prominent objects should not be lost sight of. These are: First, to preserve unimpaired the compact under which this State was admitted into the Union, wherein it was stipulated "that no taxes shall be imposed on lands or property therein belonging to the United States;" and second, to render effective, so far as consistent and proper, the tax laws of the State.

Our revenue laws in no respect contemplate the taxation of the Government title to the public domain, but on the contrary have expressly forbidden it. Yet the right to impose a tax on the possession of individual claimants to such lands is equally as distinctly asserted by these laws—a right so universally upheld by judicial authority at the present day as to have become an established and recognized principle of law. Observing the same order that these questions are discussed in the foregoing opinion, I will first consider the objection stated to the assessment roll, that "it appeared . an absolute or Government title to such land as was assessed for

taxation and not the possessory claim." The argument on this point, and which is measurably sustained by the majority of the Court, attaches as I conceive too much importance to the form of tabular statement appended to Section 13 of the Act of 1864-5, page 278, which provides that it shall be substantially in that form; and not only is it true that "these headings are badly selected, for the reason that real estate includes possessory claims according to the definition of the statute," but furthermore, it is not warranted in the plain and precise verbiage used in Section 12 of the Act. This recognizes but two distinct classifications of property, and enumerates but six separate columns, with the headings appropriate to each, whereas the tabular form uses threefold this number. Observe the language of this section: "It shall be the duty of the Assessor to prepare a tax list or assessment roll, * * * * and in said book or books he shall set down in separate columns: First—the names, etc. Second—all real estate including the ownership or claim to or possession of, or right of possession to, any land and improvements taxable to each inhabitant, firm, incorporated company or association, described by metes and bounds or by common designation or name; if situated within the limits of any city or incorporated town described by lots or fractions of lots; if without said limits, giving the number of acres as near as can be conveniently ascertained, and the location and township where situated; all improvements on public lands, describing as nearly as possible the location of said improvements; provided, that when two or more parties claim by description the same land, it shall be assessed to each party making such claim, or giving such description, according to the estimated value of the claims of each. Third—the cash value of real estate, including possessory claim to lands, and the improvements thereon. Fourth—the cash value of all improvements on real estate, including possessory claims, where the same is assessed to a person other than the owner of said real estate. Fifth—the cash value of all personal property except improvements on real estate or public lands taxable to each. Sixth—the total value of all property taxable to each," etc. Now from this we perceive that the different matters embraced within the six subdivisions of the section must be entered under their corresponding head-

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ings. Within the second subdivision property such as this in question is to be placed, and if Carson City, known to us as unincorporated, is a city, within the meaning of the Act, then the property must be "described by lots or fractions of lots;" but if not within a city, such as contemplated by the Act, then, adopting the most natural construction that can be given to such an awkwardly framed sentence, it must be "described by metes and bounds, or by common designation or name." In what essential particular, so far as it concerns the point being considered, has the Assessor failed to comply with these requisites? In none that I can discover. The name of the person to whom it was assessed is given under the first heading. In the second column the description is embodied, by words and letters which are understood to mean "lot number one, and the east twenty feet of lot number two, in Sears, Thompson & Sears' division of Carson City, and the improvements thereon;" with the further explanation contained in a succeeding column, that "the property lies in block seventeen," and "the value thereof" is fixed in the appropriate place. The description, it seems to me, is amply sufficient in either aspect in which it is to be regarded, whether within or without a city. It is equally immaterial if the prescribed form of the assessment roll must be followed, as it seems to me that in all essential respects its requirements have been observed. The description of the property is given under the only headings which could appropriately be used for property of this kind, as the fifth, sixth and seventh columns of the form are most obviously intended to be used in reference to the assessment of lands not subdivided into the smaller parcels of lots and blocks.

But it is insisted that this is defective as an assessment of a mere possessory claim or right, because nowhere within the descriptive features of the assessment roll is it by express words limited to the assessment of a possessory right or claim. Admit this to be technically true, *non constat* that the fee simple title is assessed. Certainly it is not shown by express words that the fee simple title is assessed, therefore it can only be implied from such matters as are embodied in the assessment roll. The mere fact that the Assessor has assessed, by the most apt words of description which could be chosen for the purpose, "a lot and a fraction of a

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lot," does not necessarily import the assessment of a fee simple title thereto; and this presumption, if authorized at all under any circumstances, is completely overthrown when we find, as in this case, that he follows it in giving the value by the further statement that the property so described as "a lot and the fraction of another lot" is "real estate or possessory claim and improvements," thus showing with all reasonable certainty and precision that he assessed merely the possessory right, and not the fee simple title. The circumstance that "real estate" occurs in connection with "possessory claim" is of no moment, for we have seen that the Revenue Act for such purpose declares the term "real estate" to include a "possessory claim," and therefore no more extended meaning should be given to the term than the Act gives to it. But apart from all this, does the Act in question require of the Assessor to pass upon the different degrees of title—to determine whether it is possessory only or a fee simple title? It seems to me that it does not. It is made the duty of this officer to describe the property, and the Act points out the particular method to be observed in giving description to the two distinct classes of realty—as for instance, lands in a city or an incorporated town must be described by lots or fractions of lots; but nowhere does it appear that he shall append a further description of the nature of the title so assessed. Certainly, unless the Act does expressly direct that this be done, we can have no warrant for holding that it shall be done. With our knowledge of the general condition of the tenure by which lands are held in this State—some of them held by title from the Government, but by far the greater portion even of the lands in actual occupancy of individual claimants, being held in subordination to the paramount title—we can readily see how difficult it would be to secure in all cases a correct understanding of the state of title and the changing condition of these titles by reason of parties proving up their claims to the public lands; and the issuance of certificates and patents denoting the transfer to the individual owner but further complicates the question and enhances the difficulty in securing accurate information in reference to such titles; and it would constantly be found quite impossible to ascertain the necessary facts so as to properly

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discriminate between the possessory right and the higher degree of title. In all such cases the tax laws would be absolutely powerless as a means of enforcing the collection of revenue from such source. But whether this theory be correct or not is quite immaterial in the determination of questions involved in this appeal. To me it sufficiently appears that only the possessory right or claim of Lewis to the property in dispute was assessed; and so far as the ruling of the Court below rests upon the second point of objection made to the admission of the delinquent tax list as evidence, I conclude it was error. This brings us to the further point of objection to the same instrument—"that several and distinct lots or parcels of land were assessed together, and not separately." This point, I conceive, admits of but little argument. The wording of the statute has been quoted, and in my judgment it does not authorize a joint assessment of property of this description. Furthermore, I do not look upon this feature of the case as an open question. Our statute in this particular is an exact copy of the California Act, and years before the passage of our law the Supreme Court of California had held that such an assessment was void, in the case of *Terrill v. Groves*, 18 Cal. 149, under circumstances differing from this case in no respect calculated to weaken the force of the rule. In the California case the lots were assessed to one Green, were separately listed, but valued jointly, and the aggregate tax on all of them and of two other lots in other blocks set down. The lots sued for were contiguous to each other, and formed a part of block twenty-eight of the City of Stockton, and were put up and sold together. The plaintiff in ejectment claimed under a tax deed upon a sale founded on such assessment. The Court, after citing the statute, says: "We think the true meaning of the provision is to require a separate assessment and valuation of each lot in cases like this of city property." The Court also cites 26 Maine, 217, (evidently intending 228) and 9 Ohio, 43, as holding the same rule of construction, and concluding says: "We think such construction warranted by the language of our own Act."

This seems to have become the settled law in California, as I can find no later decision holding the contrary; and by a familiar rule

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of construction, the adoption of the statute here brings with it the interpretation given it in the highest Court of that State; especially when the rule so established is not repugnant to the law, but in complete accord with it. Nor indeed can I discover wherein the cases cited place the decision on the ground of inconvenience, but in fact that the law so declares it. In the California case the Court further says: "A great deal of confusion and injustice would grow out of a gross assessment of several lots." In the case before us, although the lots are in the same block and of consecutive numbers, it does not necessarily follow that the lot and fraction of another lie contiguous to each other, nor have we anything before us showing such is a fact, as was the case in California. If the rule is established that a lot or fraction of a lot may be assessed jointly, and the value given by the assessment aggregated, when owned by one person, then there can be no limit to the rule, and equally valid would be an assessment of many lots or blocks in different portions of a town or city, if all owned by the same individual. The only correct rule, as I conceive, is the one pronounced in the cases cited above. I therefore conclude that the Court below properly rejected the delinquent assessment roll on the grounds stated in the first point of defendant's objection.

The only remaining question which I propose to consider at this time, is the ruling of the Court below, in also rejecting the tax deed as evidence for plaintiff. The deed, so far as I can discover, is in the form required by the Act. It recites the assessment, judgment, execution, levy and sale. It shows that the assessment was made against the entire property, and not on the separate and distinct parcels. In the view which I have taken of this question, it would follow that the sale being had in pursuance of an illegal and unauthorized manner of assessment, it conferred no right or title to the purchase. But it is claimed on behalf of the plaintiff, the purchaser at the tax sale, that as by Section 36 of the Acts of 1864-5, p. 289, under which Acts this assessment and sale were made, "the deed derived from the sale of real property" being declared to be "conclusive evidence of the title," that although the assessment may not have been made in conformity with the law, yet the deed is conclusive in favor of plaintiff's title. The power

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of the Legislature to pass an Act of this sweeping character has been denied in repeated instances, whilst no authority is found in support of the proposition. But conceding that to this extent the Legislature may in its discretion prescribe such a strict and conclusive rule of evidence: can the effect of a deed executed under the Act be other than to afford conclusive evidence of the truth of the matters stated in such deed, and to absolutely forbid a contesting party the privilege of combating the statements contained in the deed by opposing proofs? Such is my belief of the construction to be given this clause of the Act. The deed then being conclusive evidence of the recitals contained in it, are equally obligatory on the one party as on the other; and if it shows a tax sale, made in pursuance of an illegal and unauthorized assessment, as in this instance, the purchaser can take nothing by his deed.

From this it follows that the deed was properly excluded.

Other questions growing out of the several propositions discussed by counsel in this case have been incidentally alluded to, but which I do not deem necessary to consider until such time as they necessarily arise in some proceeding. One of these questions is in reference to the time when the State may tax the fee simple title to lands—whether at the time of the payment to the land officers or not until after the issuance of a patent; also, as to the effect of a tax of the possessory right of an individual claimant for taxes assessed and levied on such possessory right prior to the procurement of a patent from the Government. These are important questions, and demand proper consideration to be given to them before being passed upon.

For the reasons herein stated, I concur in the judgment of affirmation.

RESPONSE TO PETITION FOR REHEARING.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

The petition for rehearing in this case presents no new points, and would not require any response from us but for the fact that the opinion of the majority of the Court seems to have been mis-

understood by counsel for appellant, and possibly may have also been misunderstood by others. As this is a matter of public interest, and Assessors may hereafter be to some extent guided by this opinion, we will endeavor to make our views on the main points decided, so clear as not to be capable of misconstruction.

The first proposition the Court lays down is this: that taxing or assessing a piece of land in general terms, is taxing or assessing its whole value. When we say that a piece of land is worth \$1,000, we do not mean that a lease for one year, for ten years, or for life, in that property, is worth a thousand dollars, but that the entire fee simple title is worth that sum. If we mean to express the value of any lesser estate, we say a lease for one year, for ten years or for life, in such a piece of land, is worth so much. So when an Assessor describes property by metes and bounds, and says it is worth so many dollars, he means that the entire estate in that land is worth so much. If the title has passed from the Government to an individual, all the Assessor usually has to do is to describe the land by metes and bounds and give its entire value. The property then is liable for the entire tax, although several persons may be holding different estates therein. For instance: A is in possession of a piece of land, having a lease for five years from B; B has a lease for ten years from C; C has an estate in fee simple; the whole interest in the land is worth \$1,000. Undoubtedly the Assessor might assess the whole either to A, B or C, and other owners, known and unknown, and the assessment would be perfectly good—or he might assess A's interest at three hundred dollars, B's interest at two hundred dollars and C's interest at five hundred dollars, and it would be equally good. But when the United States owns an interest in the land, the Assessor cannot make a general assessment of the value of the land; for if he does, he is assessing that which is free from all State taxation, and the assessment is absolutely void on that account. But if an individual has any preëmption or possessory right therein which is valuable, over and above the Government price of the land, that may be taxed. But it must be shown distinctly that it is this possessory right and not the land itself which is taxed.

There is a great deal said in the petition for rehearing about

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presumptions for and against the legality of assessments, and also as to whether certain columns in the Assessor's books are matters of necessity or only convenience, the applicability of which to this case we do not see. This case was not decided upon any presumptions, nor did we decide whether certain columns in the Assessor's book were necessary, or as contended, only convenient.

We held that the second column, which describes the property to be assessed, clearly described the land which was not subject to taxation. We further intimated that possibly this misdescription in the second column might have been corrected by a proper entry in the seventh column. But undoubtedly the proper description of the property to be taxed should have been given in the second column, and then the entry in the seventh would perhaps have been unnecessary. If necessary, it would only have been to show the number of acres in the claim, and not to show the character of the tenure.

Petition denied.

By JOHNSON, J.

The opinion heretofore given by me in this case sufficiently presents my views in respect to it at the present time. In that opinion, it will be remembered that I concurred in the judgment of affirmance, but for different reasons than those assigned by my associates. Entertaining these views, I am in favor of granting a rehearing, not for the purpose of affecting the ultimate character of the judgment, but solely for the purpose of enabling the majority of the Court to place their decision on what I conceive to be the correct basis on which it should rest.

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Section 21 of the Statute of Limitations does not in any way qualify Section 5 of the same Act.

Section 5 prescribes the general rule as to limitations of real actions or actions for the possession of real estate, and Sections 14 and 15 declare the only exceptions to that rule.

Section 16 declares the limitation in personal actions, and Section 21 the exceptions to the general rule.

A has been for five years in constant use of a piece of land as a road. This shows a *prima facie* right to use it as such. B fences up the road, and when sued says: "I appropriated this land seven years since." This is not a good defense, because he does not show he has been in possession within five years.

Road and way are not synonymous terms. Way and right of way are nearly synonymous; but the word road is frequently used to mean the land over which a public or private way is established.

The first appropriator of public land has always been held in the Courts of this State as the owner of the same. The party who appropriates public land for a road is just as much entitled to it as one who appropriates a piece of land for a mill-site or cornfield.

Even if one appropriating public land for a road could not be held as having appropriated land, still a five years' uninterrupted enjoyment of the right of way would establish a prescriptive right to continue to enjoy the same.

A person assuming to have the right of way and continuously exercising that right for a period of five years without consulting the owner of the soil or asking his permission, must be considered as holding adversely.

A party who relies on a prescriptive right of way need not, when he is sued for a disturbance, aver in his complaint *in hunc verba*, that he enjoys the right of way by *prescription*. It will be sufficient for him to aver that he has enjoyed the right of way for a period long enough to have established that right.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING presiding.

The facts are fully stated in the opinion.

C. J. Hillyer, for Appellant.

The laying out, grading and using the road for five years, made a full and complete possessory title to the land over which the road actually passed, and this possession being open and notorious, was adverse to all the world. (Stat. Lim. Secs. 5 and 10; Ang. on

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Lim. Secs. 388-390, and note; 11 Peters, U. S. 53; 5 Ib. 402; 6 Pick. 172; 4 Wharton, Pa. 259.)

Section 21 does not make any exception applicable to this case. The language of Sec. 21 does not apply to corporations. (*Faulkner v. Delaware Co.*, 1 Denio, 441; *Olcott v. Tioga R. R. Co.*, 26 Barb. 148; *Clark v. Burk*, 5 Eng. Ark. 516.) We are aware the New York cases cited have been overruled in the Court of Appeals of that State, but we maintain the argument in favor of the views expressed by the Supreme Court as the more satisfactory.

Actions for the recovery of land are not within the policy of the exceptions in Section 21. That section was intended to relieve parties from loss occasioned by their inability effectually to prosecute a suit in the absence of the defendant. If there was no impediment the exceptions do not apply. (See *Sage v. Hawley*, 16 Conn. 106; 1 Clark, Iowa, 498; *Garth v. Robards*, 20 Missouri, 525.)

There was during the entire occupancy of the defendant no impediment to an effectual prosecution in this case. First—Although defendant is a California corporation, still it has, and always has had, an officer resident in this State or Territory, on whom a personal service could have been made, which would have been binding on the corporation. Second—Even if personal service could not have been had, still service by publication could have been had, and a judgment on such service would have been just as effectual against the land as upon personal service.

This is different from a judgment in an action for personal property or damages, which without personal service is only conclusive within the jurisdiction where rendered. (Story's Conflict of Laws, Secs. 463-6; 1 Breckenridge, 203; *Watts v. Kinney*, 6 Hill, 82.) Third—An action for the possession may be maintained against the actual occupant. (*Garner v. Marshall*, 9 Cal. 268; *Shaver v. McGraw*, 12 Wend. 558.) The only case we can find where a decision has been made applying the exceptions in the Statute of Limitations to a case where there was in fact no obstruction to the bringing of an action within the time limited by the general provisions of the Statute, is a case in 10 Indiana, 183. There the Court

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seems to base its decision on the very explicit language of the law which cannot be evaded. That very explicit language is not to be found in our Statute. There is, therefore, not the same reason here for failing to give the Statute a liberal and fair interpretation according to its evident spirit and interest.

Admitting the ownership of the land to be in defendants, plaintiff has shown a prescriptive right of way.

The laying out, grading, and occupancy of the road for five years, shows a prescriptive right to a private way. (*Miller v. Garlock*, 8 Barb. 153; *Garrett v. Jackson*, 20 Penn. S. R. 331; *French v. Marsten*, 4 Foster [N. H.] 451; *Pierce v. Selleck*, 18 Conn. 331; *Hall v. McLeod*, 2 Met. Ky. 98; *Curtis v. Angier*, 4 Gray, 548; *Hamilton v. White*, 4 Barb. 60; *Colvin v. Burnett*, 17 Wend. 566; *Shumway v. Simmons*, 1 Vt. 53; *Hammond v. Zehner*, 23 Barb. 473; *Corning v. Gould*, 16 Wend. 531; *Pierce v. Cloud*, 42 Penn. S. R. 102; *Steffy v. Carpenter*, 37 Ib. 41; *Worrall v. Rhodes*, 2 Wharton, 427; *Okeson v. Patterson*, 5 Casry, 22; *Hart v. Vose*, 19 Wend. 365; *Kilbourn v. Adams*, 7 Met. 39; *Bowman v. Wickliffe*, 15 B. Mon. 100; *Blake v. Everett*, 1 Allen, 248.)

In this action it was only necessary for the plaintiff to assert in its complaint a right to this road, and then allege such facts as to disturbance as would justify equitable interposition. It was not necessary to state how the right was acquired, whether by ownership of the land or an easement, or to state the evidence to support the right. We were not required to anticipate an alleged assertion of ownership in the land by defendants, by pleading either the Statute of Limitations or a prescription. Under our system, any matter proper to a replication is to be proven without any special pleadings. (*Gottschall v. Melsing*, 2 Nev. 185; *Collins v. Burnett*, 17 Wend. 566; 4 Barb. 60; 4 Foster, 451—above cited.)

The period for acquisition of a right of way or other easement, is fixed by analogy to the Statute of Limitations, and in this State would be five years. (8 Barb. 153; 1 Vt. 53; 23 Barb. 473; 16 Wend. 530—above cited; *Crandall v. Woods*, 8 Cal. 144.)

From open interrupted use, adverse claims of right, knowledge and acquiescence of owner are presumed. (37 Penn. 41; 2

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Wharton, 427; 5 Casry, 22; 19 Wend. 363; 18 Conn. 331—above cited.)

Grading the road is itself proof of exclusive claims of right. (7 Metcalf, 39—above cited.)

Although the time within which an easement is acquired is fixed in analogy to the Statute of Limitations, it is still entirely independent of the authority of the Statute. It has never been decided or even contended that the exceptions of the Statute have any application to a prescription.

The reason is apparent. Prescription is said to rest upon the foundation of a supposed grant. If established, its effect is the same as proof of a deed from the owner.

The Statute simply bars a remedy: prescription gives an absolute title. To prevent the acquisition of a title by prescription requires no resort to a Court.

A simple interruption by rebutting any presumption of acquiescence, destroys the title. In this case the building of a fence across the road within five years, could have defeated all claim by prescription. It would be absurd therefore, to suppose that the absence of the defendant should have any influence upon the acquisition of the easement.

Mesick & Seely, for Respondents.

The plaintiff's own complaint does not assert any ownership in the land over which the road passes. It only claims a road or right of way. As the plaintiff does not assert any right or ownership in the land, the Statute of Limitations in regard to the time within which suit may be maintained or defended upon title or ownership in land has nothing to do with this case. We shall therefore not notice that portion of plaintiff's brief relating to this subject, more than to say we differ totally from plaintiff's views in regard to that Statute, and if necessary think we could show that this State has really no limitation as to the time within which actions for real estate (other than mining claims) may be brought.

The plaintiff only asserts that it has been the owner, in the actual use and possession of a *road*. That defendants have obstructed the *road* by building a fence across it, etc. This is not claiming

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the land. The term *road* imports nothing but the right of way. This point was settled and made perfectly clear in the case of *Wood v. Truckee Turnpike Co.*, 24 Cal. 487-8.

The last point made by appellant is, that even if they had no right to the land, they had shown a right to an easement or right of way over the same.

A right of easement by prescription is never sustained by the Courts, except upon the theory of a supposed grant from the owner of the land to the party entitled to the easement. The period of enjoyment of the privilege necessary for maturing the enjoyment into a right, or to raise the presumption of a grant, is generally fixed by the Courts in analogy to the period of statutory limitation for maintaining suits for the possession of land: but as counsel for plaintiff correctly says, the right is independent of the authority of the statute, and grows up to one even in spite of the actual seizin and possession of the land being in another person as real owner. (10 Pick. 138, 205; 8 Barb. 153.)

Interruption by suit has never been held necessary for stopping the growth of the use into a right, but other means are quite as effectual for that purpose. The owner of the easement is not in law even considered as having any general property or seizin of the servient estate, unless he also have a fee in the dominant estate; and then it is useless as a separate estate, provided he own the whole dominant estate, for the greater swallows the less.

It is evident from the nature of the two estates, that the Statute of Limitations might never have run even for a day against the proprietor of the soil, yet the servitude have ripened into a perfect right.

Do the facts proven in this case, under the law, support the theory of a presumption of grant? We affirm that they are wholly insufficient for that purpose.

A prescriptive right, or presumption of grant, arises only when the enjoyment of the easement was "adverse in the legal sense of the term; that is, the right must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the land and uninterrupted. The burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoy-

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ment was adverse, known to the owner and uninterrupted, it is not conclusive in his favor." (*American Co. v. Bradford*, 27 Cal. 367-8-9.)

But the proofs are wholly silent in respect to all these conditions, except where they inform us that Mr. DeLong, about eighteen months before the commencement of this suit, whilst he was the owner of the land, and then for the first time knowing or supposing that the plaintiff asserted any right over the premises, went upon the ground with Mr. Beckwourth, the plaintiff's Superintendent, denied to him the plaintiff's right, asserted his own exclusive ownership, and was thenceforward negotiated with by the plaintiff in respect to a purchase by it from him, for a year or more, of this very road or right of way.

Beckwourth also testified that he first learned of DeLong's claim about a year before this suit was begun.

These facts, we insist, negative all inference of the acquiescence of the owners, or of the enjoyment being uninterrupted. (Angell on Limitations, 3d Ed., Sec. 415; *Howard v. O'Neale*, 2 Allen 210.)

In this last case it will be observed that the doctrine is admitted, but it was held that there was no error, because there appeared no evidence of any "word" of opposition to the enjoyment for twenty years to which the instruction could apply, and the instruction was full besides.

Then because those under whom the defendants claim did acquire a right to the land; and the plaintiff's claim is only an easement by right of prescription; and the enjoyment is not shown to have been acquiesced in by the owners of the land, or uninterrupted for any period of limitation, we claim that the judgment must be affirmed.

Opinion by BEATTY, C. J., LEWIS, J., concurring specially.

In the year 1860 certain parties took steps to appropriate and take up for private use a portion of public land in or near Virginia City.

Subsequently, in April and May of 1861, the Potosi Company, a mining association, laid out and built a road through the same

land. Since then the Potosi Company has been consolidated with the Chollar Company, and the two are now incorporated as the Chollar-Potosi Company.

The Potosi Company and the Chollar-Potosi Company have continued since May, 1861, to use and enjoy that road, and have suffered all persons having business or pleasure leading them to the Potosi works to use the same freely, as if it were a public road. In May, 1867, the defendants built a fence across the Potosi road, thereby obstructing travel on the same. The plaintiff, which has succeeded to the Potosi Company's rights, then filed its bill to enjoin the defendants from obstructing this road.

The defendants, in answer to this bill filed, set up the fact of the location in 1860, and claim that as the successors in interest of those who located this tract of land they have exclusive right of possession, and consequently the right to obstruct the road.

Whether the defendants are entitled to the possession of the land they or their predecessors attempted to appropriate in 1860, it is unnecessary to inquire under our view of the case. The plaintiff claims an absolute right to the road, asserts continuous and uninterrupted possession of the same for more than five years previous to the obstruction of the road by defendants, and relies on the statute of limitations as securing its rights. The plaintiff also claims a right of way by prescription.

The defendants (respondents in this Court) claim that the appellant is not entitled to protection under the Statute of Limitations, for two reasons :

First, because the appellant (plaintiff in the Court below) is a foreign corporation, and is therefore not protected by the statute. Second, because the road is not land, but a mere incorporeal hereditament, and therefore is not included within the terms of our statute in regard to entries on land. Lastly, it is contended by respondents that the appellant cannot claim any rights by prescription, because none such have been pleaded.

We will examine these three propositions seriatim. And first as to the point, how is this question of limitations affected by the fact of plaintiff's being a foreign corporation, or a corporation created in a neighboring State ?

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The fifth section of our Statute of Limitations reads as follows :

" No cause of action or defense to an action founded upon the title to real property, or to rents or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted, or defense is made."

Then follow several sections in regard to the effect of forcible entry, defining what shall be adverse possession, etc.

Sections 14 and 15 read as follows :

" SEC. 14. If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services, out of the same be, at the time such title shall first descend or accrue, either : First, within the age of twenty-one years ; or second, insane ; or third, imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than life ; or fourth, a married woman."

" SEC. 15. The time during which such disability shall continue shall not be deemed any portion of the time in this Act limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made within the period of five years after such disability ; but such action shall not be commenced, or entry or defense made after that period."

Section 16, *et sequitur* to Sec. 21, prescribes limitations for personal actions.

Sections 21 and 22 read as follows :

" SECTION 21. If, when the cause of action shall accrue against a person, he is out of the Territory, the action may be commenced within the term herein limited after his return to the Territory ; and if, after the cause of action shall have accrued, he depart the territory, the time of his absence shall not be part of the time limited for the commencement of the action."

" SECTION 22. If a person entitled to bring an action other than

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for the recovery of real property, except for a penalty or forfeiture, or against a Sheriff or other officer for an escape, be at the time the cause of action accrued, either: First, within the age of twenty-one years; or second, insane; or third, imprisoned on a criminal charge, or in execution under the sentence of a criminal Court, for a term less than his natural life; or fourth, a married woman; the time of such disability shall not be a part of the time limited for the commencement of the action."

Respondent contends that a foreign corporation being in contemplation of law always absent from the State, the twenty-first section prevents the statute from ever running in its favor. Several cases are referred to on this point, some of which do clearly hold that in personal actions under a statute similar to ours, it never runs in favor of a foreign corporation. There is also one case cited from the Tenth Indiana Reports, where the action was for the recovery of land, where the Court had held that the absence of the defendant would excuse the bringing of an action within the time limited by statute. This latter case we will notice presently. With regard to the question which seems to be mooted, whether in a personal action the fact that the defendants being a foreign corporation is to have the same effect in suspending the running of the statute as the absence from the State of a natural person, we do not think need be determined in this case.

The twenty-first section, we are satisfied, in no manner qualifies the provisions of the fifth section. It simply provides that where a cause of action accrues against a person out of the Territory, (now State) or such person departs from the Territory, the statute shall not run during the absence of the defendant.

But Sec. 5 imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past. The limitation being here in respect to the possession of the land, we do not see how the provisions of Section 21 could qualify this Section 5, unless the land should have absented itself from the State. This, we believe, is not claimed.

But it is said by respondent that whatever may be the language of Section 5, the spirit and intent is to impose a limitation of five

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years to the bringing of real actions, and this Section 21 must, if liberally and beneficially interpreted, excuse a party from bringing his action as well for realty as for personal property or damages where the person in adverse interest is absent from the State when a cause of action arises.

An examination of the whole Act will, we think, clearly show that such was not the intention of the Legislature. And we think the distinction in the two classes of cases was eminently wise and proper. Section 5 prescribes the limitation to real actions in general terms. Sections 14 and 15 make the exceptions to the operation of the general rule, and we think it was evident that these are intended to constitute the only exceptions to the general rule. If it had been intended to make other exceptions to the running of the statute in real actions, they would most likely have been either incorporated in Sections 14 and 15, or added in a separate section in immediate connection with them. But after Section 15 comes the limitation in personal actions in Section 16; and then in Sections 21 and 22 come the exceptions to the limitations imposed in Section 16. Neither the language nor the context seem to connect Sections 21 or 22 with Section 5. Indeed Section 22 is expressly limited to actions other than for real property, and Section 21 is not by its terms applicable to the limitations imposed in Section 5. Here was a party who had been five years in the uninterrupted possession of a piece of land, using it as a road. This showed a *prima facie* right to continue to use such land as a road. Respondents enter upon and build a fence across it. They are sued, and in answer to the *prima facie* case made out by plaintiff say: "We had a right to enter, because we took up and appropriated this land through which the road runs some seven years since." But they fail to show that they had been in possession of this land within five years. This defense then wants one element of being a good one, for the law says: "No * * defense to an action founded upon the title to real property * * shall be effectual unless it appear that the person * * making the defense * * was seized or possessed of the premises in question within five years before the commencement of the Act in respect to which such * * defense [is] made."

Respondent, however, insists that this view of the case is in direct

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conflict with the decision of the Supreme Court of the State of Indiana, in the case of *Lagow and others v. Neilson*. Without expressing any opinion as to the correctness of the decision of the Indiana Court, we think it can be safely affirmed that it can afford but little aid in interpreting our statute. In that case the defendant Neilson, for his third plea, says: "That the cause of action did not accrue to the plaintiff within twenty years next before this action was brought." The Court, in speaking of the third plea, or "third paragraph of the answer," as they call it, use this language:

"The reply to the third paragraph of the answer is as follows: 'Plaintiffs say that for twenty years next before the commencement of this action, Neilson, the defendant, was a nonresident of this State.' To this reply the Court sustained a demurrer. And the question to settle is, does the reply avoid the defense of the Statute of Limitations?

"Section 216 of that statute declares that the time during which the defendant is a nonresident of the State, or absent on public business, shall not be computed in any of the periods of limitation. But when the cause has been fully barred by the laws of the place where the defendant has resided, such bar shall be the same defense here as though it had arisen within this State.' (2 R. S., p. 77.)

"It is insisted that this section was intended to apply to personal actions, and not to those instituted for the recovery of real property. We are not inclined to adopt that construction. As contended, the concluding branch of the section should not be so construed as to allow the law of limitation of a sister State to be used here in regard to actions for the realty; and it may be that, for the recovery of real estate, a party is never prevented from bringing his suit by the nonresidency of any claimant or owner; still these conclusions, not being inconsistent with the very explicit language used in the first branch of the enactment, cannot be allowed to control it. The phrase 'shall not be computed in any of the periods of limitation,' evidently refers to all the periods of limitation definitely fixed by the statute; hence there seems to be no room left for construction. The demurrer was not well taken."

The difference between the language of Section 216 of the Indi-

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ana statute and Section 21 of our Act is striking. "Any of the periods of limitation" is a much more comprehensive phrase than "when the cause of action shall accrue against a person." The first would readily include a period of time after the lapse of which an entry on land would be illegal. The latter does not by its terms refer to any such period. Besides, the terms of the Indiana statute (which is not accessible to us) in regard to the limitation of real actions may be entirely different from ours. The Indiana Court seems to have arrived at the conclusion it adopted only because of the explicit language of their statute. Ours is so very different that the case referred to afforded us but little aid in constructing it. We are satisfied that the nonresidence of a party claiming real estate does not affect or qualify the provisions of Section 5 of our Act. If land is vacant, the owner can take peaceable possession without suit. If occupied, he can bring suit against the occupant, and it is not necessary to inquire what the status of the occupier is. If the land is occupied by a mere servant, as between him and his employer, the possession is in the master and not the servant. But if a third party owns the land, both are trespassers as against him, and a suit against the servant is just as effectual as against the master.

It is, however, contended by respondents that the record does not show that the appellant had or claimed to have any land, but merely a right of way over land. The language of the complaint is as follows: "That it is now, and for more than five years last past, it and its predecessors in interest have been the owners of and in the possession and actual use and enjoyment of a certain road, situate in said county, in the city of Virginia, leading from what is known as the Potosi dump, near the mouth of the Potosi tunnel southward, near the line of E street in said city, into Gold Hill, and thence westward into C street; said road being about thirty feet wide and about half a mile in length, and known as the Potosi Road."

The proof shows clearly that the Potosi Company surveyed and graded this road for travel in 1861, and since then have been continuously using it as a road.

Respondents contend that this averment and proof does not show

an occupation or possessory right to the land over which the road is built, but merely a claim to a right of way. In support of this view they cite the opinion written by Mr. Justice Shafter, and apparently concurred in by the entire bench of the Supreme Court of California, in the case of *Wood et al. v. Truckee Turnpike Co.*, 24 Cal. 487. We quote from that opinion the following language: "The plaintiffs acquired nothing by the purchase of the road to which the action of ejectment has any remedial relations. 'Road' is a legal term strictly synonymous with the term 'way,' and in the complaint, and throughout all the title papers of the plaintiffs, their identity is fully recognized. A way is an easement, and consists in the right of passing over another man's ground. (Wash. on Eas. 161.) It is an incorporeal hereditament, a servitude imposed upon corporeal property, and not a part of it. It gives no right to possess the land upon which it is imposed, but a right merely to the party in whom the way is vested to enjoy the way. Neither is it considered that the owner of the way is entitled, by reason of such ownership, to a participation in the rents and profits arising from the land upon which the easement is imposed. (Wash. on Eas. 8.) A deed of way, or of a right of way, would pass to the grantee no title to or interest in the land."

The main point here is that the word "road" is exactly synonymous with "way." This proposition we conceive to be utterly untenable. It is true that the term "way" is sometimes used in the same sense as road. Sometimes we call a road a street, a lane, etc., a *way*—though this is, perhaps, an improper use of the term "way."

But Mr. Washburn, when defining "way" as an easement, uses the word in a strictly legal sense. "Way," in its legal, technical sense, means nearly the same thing as "right of way." Or in other words, the right of one person, of several persons, or of the community at large, to pass over the land of another.

Webster, among other definitions of a road, says it is the "ground appropriated for travel, forming a communication," etc.

Bouvier defines a road as "a passage through the country for the use of the people." He also says: "The public have the use of roads. But the owners of the land through which they are

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made, or which bound upon the roads, have *prima facie* a fee in such highway." Or in plain English, the public does not usually own the soil over which roads are constructed, but only a perpetual right to use that soil for some particular purpose.

We cannot find that the word "road" is anywhere used or defined, save in the opinion just quoted, as being synonymous with right of way. In fact, we feel certain it is never so used in common conversation, in ordinary writing, nor in legal works. Road means any piece of land used or appropriated for travel. It may be so appropriated by an individual, a corporation or the public. Where roads are constructed by turnpike and railroad companies, sometimes they acquire a complete title to the land over which their road is built, and sometimes only the right of way. So the public may, if it chooses, buy the land over which a public way is to be established if the individual owner is willing to sell it, or may, which is more usual, only purchase or procure by the proper proceedings the right of way for such road. The road however is one thing, the right of way is another, and very different.

If an individual wishes to make a road for his own use, and can buy the land over which he wishes to pass for precisely the same money that it would cost to acquire the right of way, undoubtedly he would buy rather than acquire a mere easement. The public lands are open here to be appropriated by any one who desires to do so. The first appropriator has always been considered and held by the Courts of this State as the owner of the land as against all the world except the Government of the United States. We see no reason why one who appropriates a portion of the public domain for the purposes of a road, is not as well entitled to the protection of the Courts as one who appropriates a fraction of the same domain for a mill-site or cornfield.

If the public were to lay out a road eighty feet in width through the farm of A, and he were to make a conveyance to B, describing the property sold as a road eighty feet in width and one mile in length, passing through the farm of the grantor, we think it would be just as good a conveyance as if he were to describe the property sold as a piece of land eighty feet wide and one mile in length, extending from one side of grantor's farm to the other, and being

the same land over which a public road is laid out. The meaning in either case would be equally obvious, and in either case the purchaser would get the fee of the land subject to the public easement.

The language of the complaint and the proof shows the plaintiff's right to the land (not a mere easement) over which the road runs. Having been for five years in the uninterrupted possession of the same, plaintiff is protected by the Statute of Limitations, and the acts of the defendant in stopping up the road were tortious, and such as to entitle the plaintiff to the relief sought.

But even admitting that plaintiff did not appropriate the soil, but only claimed the right of way when locating the road, we do not see how that could aid the defendants. An uninterrupted adverse enjoyment of the right of way for more than five years would by prescription establish the plaintiff's right to continue in the enjoyment of the same privileges. Here the plaintiff and those through whom it derives title, were in the enjoyment of this road for more than five years without disturbance. It is true that before the expiration of five years, there was a claim asserted adverse to their continued enjoyment of this right. The plaintiff or its agent was informed by Mr. DeLong that other parties owned or claimed the land over which their road ran; a proposal was made to sell to plaintiff their right to continue the road, or something of this kind. But a mere proposition of this kind does not amount to a disturbance.

The enjoyment must therefore be considered as continuous and uninterrupted during a period exceeding five years.

The point that the possession or enjoyment is not shown to have been adverse, we think is not well taken. Whenever a party assumes and exercises a right of way, openly, notoriously and continuously, without asking the consent of the owner of the land, and without in any way manifesting by word or deed that he is exercising the right as a favor or license given him by the owner of the soil, it must be considered as exercised adversely to the owner of the land. This appears clearly to have been a case of that sort. At least, such facts are shown as make a *prima facie* case of adverse holding, and nothing is attempted to be shown to the contrary by the defendants. They do not attempt to show that this privilege was exercised in subordination to their rights.

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The respondents further contend that if the plaintiff had any rights established by prescription, it has not properly pleaded such prescription, and therefore it cannot avail itself of such right in this Court.

Chitty, in his work on pleadings, Vol. 1, p. 380, speaking about the particularity with which a plaintiff's case should be stated in his declaration, says: "But it is now fully settled that in a personal action against a wrong-doer for the recovery of damages, and not the land itself, it is sufficient at common law to state in the declaration that the plaintiff, at the time the injury was committed, was possessed of a house or land, etc.; and that by reason of such possession he was entitled to the common of pasture, way, or other right, in the exercise of which he has been disturbed;" and further says, on page 381: "So, if the declaration be for diverting a water course from the plaintiff's mill, his possession of the mill should be concisely stated, and that by reason thereof he ought to have had the use and benefit of the water course, without stating that it was an ancient mill or disclosing the particular grounds upon which the right to the water is claimed. And in an action for a disturbance of a right of common, or way, or of a seat or pew in a church, the declaration states the possession of a house or land, etc.; and that by reason thereof the plaintiff was entitled to the right, in the exercise of which he had been disturbed."

We think the complaint here is as specific, and shows the ground of appellant's claim with as much particularity, as Mr. Chitty seems to think is necessary in a common law declaration. Our system of pleading is extremely liberal, and we are not disposed to hold that parties shall lose their rights merely because they do not plead them with the greatest precision and nicety. The complaint shows the defendant clearly the nature of the plaintiff's claim, and under our system that is sufficient.

The judgment of the Court below is reversed, and that Court will take further proceedings in the case according to the views herein expressed.

LEWIS J.—Upon the prescriptive right of way I concur with the reasoning and conclusion of the Chief Justice.

JOHNSON, J., having been counsel for one of these parties, does not participate in this decision.

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S. L. HEINTZELMAN, RESPONDENT, v. GEO. W. L'AM-
OROUX AND THE TRINITY AND SACRAMENTO
SILVER MINING CO., A CORPORATION; SAID CORPORA-
TION BEING APPELLANT.

Under our Practice Act, is it sufficient ground for allowing an attorney to verify an answer to show that defendant is a foreign corporation? Should it not also be shown that the corporation has no officer in the county where the answer is prepared?

Even if the affidavit to an answer is insufficient, is not the objection waived by the opposite party accepting service of the answer, without objection to the sufficiency of the affidavit? Should not the answer in such case be returned with notice that it would not be accepted for want of a proper verification?

Where there is a defective verification of an answer, the defendant should be allowed to correct the error if he desires to do so.

Where a note is made by A to B, and by B indorsed to C, B is a regular indorser and entitled to all rights, and only subject to the liabilities of an indorser, although it may have been agreed in advance of the execution of the note that A was to make, and B to indorse the note for the benefit of C.

APPEAL from the District Court of the Fifth Judicial District,
Hon. GEO. G. BERRY, presiding.

Hillyer & Whitman, for Appellant.

Wells & Denson, for Respondent.

The answer was not properly verified, and if defendant wished to amend it he should have asked leave to do so; failing to ask leave, the Court did not err in entering judgment for appellant.

Opinion by BEATTY, C. J., full Bench concurring.

The plaintiff in this case (respondent in this Court) brought his action against the defendants, and in substance averred, among other things, the following facts: That defendant, L'Amoroux, executed and delivered to plaintiff his promissory note in the following terms:

“OREANA, Nev. September 29, 1866.

“Forty-five days after date, for value received, I promise to pay to the order of the Trinity and Sacramento Silver Mining Company, fourteen hundred and seventeen dollars and a half, in United States gold coin or its equivalent in United States currency.

“ (Signed) G. W. L'AMOROUX.”

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That at the same time, the defendant, the Trinity and Sacramento Silver Mining Company, indorsed the same—"Pay S. L. Heintzelman or his order"—and that the execution and indorsement of the note were all part and parcel of the transaction, and therefore both defendants were bound as joint makers. The complaint was verified. L'Amoroux made no defense; the other defendant filed an answer, which was verified by its attorney, and which verification is in the following terms:

"STATE OF NEVADA,
County of Humboldt. } ss.

"E. F. Dunne, being duly sworn, says he is one of the attorneys for the defendant, the Trinity and Sacramento Silver Mining Company, one of the defendants in above action: that the foregoing answer is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. Deponent further says the reason why this verification is not made by the defendant, the Trinity and Sacramento Silver Mining Company, is that said defendant is a corporation under the laws of the State of New York, and further that said defendant is absent from the county where the attorneys of said defendants reside. E. F. DUNNE.

"Subscribed and sworn to before me, this fifth day of August, A.D. 1867.

"J. D. MINOR, Clerk Humboldt Co., Nev."

Subsequent to the filing and service of this answer, and when the case was called for trial, the plaintiff's counsel moved to strike out the answer on the ground that it was not properly verified, and to allow the plaintiffs to take judgment. This motion, after argument, was sustained by the Court below, and judgment entered against the Trinity and Sacramento Silver Mining Company, from which that company appeals.

The only question which seems to have been raised in the Court below, was as to the proper construction of the fifty-fifth section of the Practice Act, which is in these words:

"In all cases of the verification of a pleading the affidavit of the party shall state that the same is true of his own knowledge, except

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as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides; or from some cause unable to verify it; or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney or any other person except the party, he shall set forth in the affidavit the reason why it is not made by the party. When a corporation is a party the verification may be made by an officer thereof; or when the Territory, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts; except that in actions prosecuted by the Attorney General or District Attorney in behalf of the Territory, the pleadings need not, in any case, be verified."

The respondent contends that when a corporation is a party to an action, it is not sufficient to show that the corporation is absent to entitle its attorney to verify a pleading, but that it must be shown that all officers of such corporation are absent before the attorney can verify on the sole ground of absence of the party he represents.

This the Court below held, and we are inclined to think this was the proper ruling on this point. A corporation, as such, cannot verify a pleading. In this, as in other matters, it can only act through an officer, agent or attorney. Therefore it was, so far as the verification was concerned, wholly immaterial whether it was a corporation framed under the laws of this State or a neighboring State.

Although it may have been a New York corporation, it may have had one or more officers in Humboldt County. If there was any such officer in the county he was, *prima facie*, the right person to verify the answer. To hold that the attorney might verify a pleading for a corporation by merely showing that the corporation was formed abroad, would perhaps be following the apparent proper construction of the language of the section quoted, but would be at variance with the obvious intent of the Legislature. To make the provisions of Section 55 conform to reason and common sense, we think the word "party," in the second sentence of the section may be held to refer to the party who by law is made, primarily, the

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proper person to verify a pleading, rather than to the party plaintiff or defendant. But be this as it may, we think the practice in this case was hardly a proper one. The answer was served on the plaintiff's counsel, and it seems to us the proper practice, if it was intended to object to the verification, would have been to return the answer, with a notification that it would not be accepted for want of a proper verification. If this was not done, ought not the acceptance of a copy, with the imperfect verification, without objection, to be treated as a waiver of the informality in the verification? (See *Wilkin v. Gilman*, 13 How. Pr. —.)

Even if the answer was properly stricken out, the defendant should have been allowed, (if it so desired) to correct this imperfection in the verification, either by the attorney who verified it making a new verification, if it were in his power to show that the corporation had no officer in the county; or if there were such officer in the county, by allowing him to verify it. We have made these remarks merely to suggest what we think is a proper practice in such a case.

This case must be reversed on another point, which is more fairly presented by the record than some of the points of practice which we have been discussing. The complaint shows no cause of action against appellant.

The note seems to have been a regular negotiable note, executed by L'Amoroux to appellant and indorsed by appellant to the plaintiff. The complaint does not show any demand or notice, and consequently shows no liability on the part of appellant.

We do not see how the fact that the making of the note and the indorsement thereof to plaintiff were part of one and the same transaction can vary the liability of the parties. The fact that the note was made payable to appellant and by it indorsed, shows plainly it was not the intention of appellant to become primarily liable, but only as indorser upon due demand of the principal, and notice in case of nonpayment.

The note appears to have been regularly executed and indorsed, and thereby the liabilities of the respective parties were fixed. It can make no difference that it was agreed beforehand that L'Amoroux was to make and appellant to indorse the note for plaintiff's

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benefit; nor does it make any difference by whom the note was handed to plaintiff. The judgment of the Court below is reversed, and that Court will allow the plaintiff to amend his complaint, and proceed regularly to dispose of the case in accordance with the views expressed in this opinion, or else to take a separate judgment against L'Amoroux on the present complaint, (default being first taken) and dismissing the action against appellant.

WILLIAM KIDD, RESPONDENT, v. THE FOUR-TWENTY
MINING CO., APPELLANT.

When a plaintiff might proceed under either one of two laws prescribing the method of serving summons, one of which laws would require the defendant to answer within twenty days, and the other forty, and the summons was so contradictory and indefinite as not to show under which law the plaintiff was proceeding, the defendant would not be bound to answer within twenty days, and no default could legally be taken until after the expiration of forty days.

Where the first clause of a summons requires the defendant to appear and answer within forty days, and concluding clause notifies him that if he does not answer in *twenty* days a default will be taken, this is too contradictory and uncertain to require an answer within the shorter period.

When a default is improperly taken the defendant ought, if an opportunity is presented during the term at which it was taken, to apply to the Court below for relief.

Could the lower Court set aside a default and judgment after the term had expired within which the judgment was rendered—*Quere?*

Appeal is a proper remedy to set aside a judgment by default irregularly and erroneously entered.

APPEAL from a judgment rendered by default in the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion of the Court.

Aldrich & DeLong, for Appellant.

The summons is too uncertain to support the judgment. It requires the defendant to appear within forty days—then says default will be taken, if it does not appear within twenty days, and judgment is entered on the twenty-second day after service.

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The summons is further defective in not stating the amount for which judgment will be entered.

Opinion by BEATTY, C. J., JOHNSON, J., concurring.

In this case a judgment was taken against the defendant by default, from which it appeals, and the principal question is as to the regularity of the default.

The default was founded on the following summons and service thereof, and was taken June 16th, 1866 :

" You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the First Judicial District of the State of Nevada, in and for the County of Storey, and answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served in said county, but within said district, within twenty days ; and in all other cases, forty days ; or judgment by default will be taken against you, according to the prayer of said complaint.

" The said action is brought to recover judgment for the sum of \$1,550.91, besides costs of suit, as follows : \$1,500.91, as is alleged, as a balance on contract for sinking, timbering, framing, curbing and dividing the shafts of defendant, situate in Storey County, Nevada ; and fifty dollars for services in repairing the puppet-heads, etc., of the whim attached to the shaft of defendant, together with legal interest on \$1,500.91 from February 15th, 1865 ; all of which is more fully set forth in plaintiff's complaint on file in my office, a copy of which is hereto attached and referred to.

" And you are hereby notified, that if you fail to appear and answer the said complaint, the said plaintiffs will take judgment, as therein demanded, within twenty days after service hereof."

" Henry L. Davis, being first duly sworn, says and certifies that he is the Sheriff of the City and County of San Francisco, State of California ; that he received the annexed summons on the twenty-fifth day of May, A.D. 1866, and personally served the same on the same day upon the within named defendant, the " 420 " Mining Company, by delivering to H. O. Howard, the Secretary of said mining company the said defendant, personally,

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in the city and county aforesaid, a true copy of said summons, attached to a certified copy of the complaint referred to in said summons, and at the same time showing to him the said annexed original summons."

The twenty-fifth section of the Practice Act of 1861 reads as follows:

"The time in which the summons shall require the defendant to answer the complaint shall be as follows: First—If the defendant is served within the county in which the action is brought, ten days. Second—If the defendant is served out of the county, but in the district in which the action is brought, twenty days. Third—In all other cases, forty days."

This summons seems in its opening sentence to have been framed in compliance with the requirements of this section, except that it reads "if served in said county but within said district," etc., when it is evident that several words are omitted between the words "county" and "but." This portion of the sentence should properly have read "if served in said county, *or if served out of said county*, but within said district," etc. The italics show the words omitted in the summons. With this exception this part of the summons is properly framed under the Act of 1861. But the concluding part of the summons warns the defendant that if it fails to answer within twenty days after the service, default will be taken against it. The latter part of the summons is inconsistent with the first. The first part, if intelligible at all, means that if the defendant is served in Storey County, it shall have ten days only within which to answer. If served within the First Judicial District, but outside of Storey County, (an absurd and foolish clause to put in a summons where there is only one county in the district) twenty days, and in all other cases forty days.

Here there is an apparent contradiction between the different parts of the summons, calculated to mislead and deceive the defendant. But it is suggested that the law of 1864-5, amending the thirtieth section of the Practice Act of 1861, provides that where a corporation incorporated in California, but doing business in this State, is sued, and has no officer here upon whom service can be made, the Court or Judge before whom the action is pending may

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make a special order (on affidavit showing the necessary facts) for service in a particular manner in California, and requiring the corporation to answer within twenty days: that this service was made in conformity with this amended Act, and the appellant was bound to know the law, and knowing the law could not have been deceived as to the time within which it must answer. To this suggestion the obvious answer is, that plaintiff could have proceeded either under the law of 1861, or by making the necessary affidavit under the amendment of 1864-5. If it could be held in such a case that defendant was bound to know the law, it certainly could not be held to know whether plaintiff was proceeding under the Act of 1861 or the amended Act of 1864-5. There is nothing in the summons to enlighten the defendant as to this fact. Indeed this Court is as much in the dark as to this matter as the defendant. There is nothing in the record to show that any affidavit was ever made as to the fact that defendant had no officers resident in Nevada, or that the Judge or Court ever made any order as to the service of summons under the provisions of the Act of 1864-5.

This summons was too indefinite to admit of default being taken at the expiration of twenty days.

It has been suggested that appellant should have applied to the Court below for relief before bringing the case to this Court. It is quite possible that would have been the better course. Especially would that have been the better course if the judgment was rendered during term time, and the appellant had an opportunity to apply to the Court before the close of its term. Whether a District Court would in such a case have the authority, after the expiration of the term, to set aside the default, may be somewhat questionable. (See *Shaw v. McGregor*, 8 Cal. 521; *Dorente v. Sullivan*, 7 Cal. 279-80.)

In New York, under a code similar to ours, it has been frequently said there can be no appeal from a judgment by default. If a party does not make his defense in the Court of original jurisdiction he will not be heard in the Appellate Court for the first time, for this would be making the Appellate Court exercise the functions of a Court of original jurisdiction. Nor are we unmindful of the fact that the late Justice Brosnan, in the case of *Paul et al. v.*

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Armstrong, 1 Nev. 82, held that "a judgment by default is not appealable." (See opinion on page ninety-six of the Report.) But as the then Chief Justice [Lewis] concurred in the affirmance of the judgment for reasons different from those assigned in the opinion, and the present Chief Justice did not participate in the hearing of the appeal, the rule thus stated cannot be regarded as an authoritative expression of the Court. We shall therefore consider this an open question in this State, giving to the opinion of our lamented associate such weight as it is justly entitled to.

It must be observed that in all the New York cases to which our attention has been called there was no question about the regularity of the default. The question in each case was, whether a party would be allowed to prosecute an appeal from a judgment, decree, or order made against him in a case where he did not appear and contest the same, but suffered it to be taken without opposition, protest, or argument on his part, although regularly before the Court, and having the opportunity to contest.

The authorities on this subject are all referred to in Abbot's New York Digest, under the head of "Appeal."

This is a very different case from that. Here the default was irregularly taken, and judgment is entered without proper authority. In such case it has repeatedly been held in California that an appeal is the proper remedy—at least, that it is *a* proper remedy. (See *Stevens v. Ross*, 1 Cal. 97; *Parker v. Shepherd*, 1 Cal. 131-2; *Burt et al. v. Scranton et al.*, 1 Cal. 416-7; *Joice v. Joice*, 5 Cal. 449.) We have copied our statutory laws almost exclusively from those of California, and we look almost exclusively to that State for rulings upon matters of practice. We shall not then deny to parties the right to such a remedy by appeal, which has always been held to be the proper remedy in such cases in California. But whilst we will allow a party to seek relief for a judgment improperly rendered upon default by appealing to this Court, we will exercise our discretion as to matters of costs.

In this case the summons left it doubtful whether defendant was bound to answer by, say the fifteenth of June or the fifth of July. If it did not think it necessary to answer by the former, it certainly should have answered by the latter period, if any defense was to be

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made. The Court in that county commenced its term on the first Monday in June, and by law was authorized to sit until the first Monday in October. We know that that Court usually sits for the greater part of the time allowed by law for it to be in session. Had the defendant attempted to answer on or before the fifth of July, it would have heard of the judgment, which was entered up the sixteenth of June. It could then most likely have applied to the Court below to set aside the default long before the expiration of the term. This it does not do, but waits to the last hour almost of the year to take an appeal.

Under these circumstances, we will reverse the judgment of the Court below, and order the costs of this appeal to abide the final result of the case. It is so ordered.

THE WHITMAN GOLD & SILVER MINING CO., APPELLANT, v. F. M. BAKER AND OTHERS, RESPONDENTS.

A corporation formed in California may hold land in this State.

Our Courts would, in a proper case, probably hold that a corporation formed in another State could hold no more land in this State than is allowed to be held by corporations under our own law, to wit: what was necessary to conduct the business for which it was incorporated, and no more.

When a corporation formed in another State is limited by its charter as to the number of acres of land it may purchase for the purposes of conducting its business, will our Courts hold that such corporation is incapable of holding a greater number of acres in this State—*Quere?*

It would seem the Legislature might grant to foreign corporations the right to acquire in this State any quantity of land, although limited by its charter to the purchase of a smaller quantity.

Corporations created by Legislative enactment have only such powers as are specifically granted, or are necessarily incident to those granted.

There is a difference between exercising powers entirely foreign to the nature of a corporation, and exercising legitimate powers to an improper extent. In the former case the acts done might be absolutely void; in the latter they would only be voidable by a proper proceeding on the part of the State.

If a corporation holds more land than it is legitimately entitled to hold, still individuals will not be protected in trespassing on any portion of such land.

The law of 1861, in regard to surveys of public land, has been repealed. The tenth and thirteenth sections of that Act are unconditionally repealed, without any qualification.

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When a second action for damages is brought, including the damages in a former action, and also damages accrued after the bringing of the former action, the first suit cannot be pleaded in abatement of the last. A plea of abatement must go to the entire cause of action.

The ruling of a Court in regard to a mere interlocutory order cannot be held as *res adjudicata*.

APPEAL from the District Court of the Third Judicial District, Lyon County, Hon. WM. HAYDON, presiding.

The facts are stated in the opinion of the Court.

Ellis & Sawyer, for Appellant, made the following points:

The law of this State, and not the law of California, must govern as to limitations upon appellant's capacity to hold land. (Story on Conflict of Laws, Secs. 424, 428, 430, 431, 434, 463; Ang. & Ames on Corp., Secs. 162-163; *Lathrop v. Bank of Scioto*, 8 Dana, 121; *Runyan v. Coster's Lessees*, 14 Pet. 122; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; 2 Kent's Com. 284-285.)

The law of this State does not limit corporations in their capacity to hold land. (2 Bla. Com. 75, 76; *Lathrop v. Bank of Scioto*, 8 Dana, 120; 1 Bla. Com. 475; Ang. & Ames on Corp., Sec. 145; 2 Kent's Com. 277; Stats. 1861, Chap. 1; Statutes touching Corporations.)

If appellant has exceeded its capacity to hold land—as the same exists either by the laws of this State or of California—it cannot be inquired into in this action. (Ang. & Ames on Corp., Secs. 152, 161; *Leazure v. Hillegas*, 7 S. R. 320; *Baird v. Bank of Washington*, 11 S. R. 418; *Runyan v. Coster's Lessees*, 14 Pet. 122; *People v. Mauran*, 5 Denio, 389; *Silver Lake Bank v. North*, 4 John. Ch. 373; *Natoma W. & M. Co. v. Clarken*, 14 Cal. 552; *Lathrop v. Bank of Scioto*, 8 Dana, 129; 14 Curtis, 3, 85.)

If appellant had a right to hold the land, the title by which it held it is good under the law of this State. (*Coryell v. Cain*, 16 Cal. 573; *Sankey v. Noyes*, 1 Nev. 71-72; *McFarland v. Culbertson*, 2 Nev. 280.)

The acts of trespass being committed by defendants, (respond-

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ents) were such as the Courts now will relieve against by injunction. (*Natoma W. & M. Co. v. Clarken*, 14 Cal. 551; *Halleck v. Mixer*, 16 Cal. 578; *Hecks v. Mitchell*, 15 Ib. 108.)

The former action cannot be pleaded in abatement of this, for the reasons, among others, that the former action does not embrace the entire period of time and entire cause of action stated in the latter.

C. E. DeLong, for Respondents.

The respondents' brief is in reply to the points made by the appellant. It is an extended argument and not capable of being so abridged as to come within the space usually allowed to counsels' brief in these reports.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

The appellant in this case is an incorporation formed under the general incorporation laws of California for mining purposes. Some time before the institution of this suit the appellant had inclosed and by its agents occupied a piece of the public timbered land containing some sixteen or seventeen hundred acres. The respondents, or some of them at least, (the others probably being their employees) in the month of August last caused two surveys to be made (under a former law of this State in regard to surveying and holding public lands) within this inclosure, claiming some thirteen or fourteen hundred acres of this enclosed land. About the time of the surveys they also entered upon the land now claimed under the surveys and commenced cutting the wood off. The appellant then commenced suit against John Williams, John Doe and Richard Roe for trespass, and praying for an injunction to restrain the trespassers during the litigation. The summons was served on John Williams and some ten other persons, all of whom answered the complaint.

At some subsequent stage of the proceedings this case was dismissed as to all the defendants except John Williams. As to him it is still pending. The Court refused to grant a temporary injunction pending the suit, and from this order no appeal was taken. The cutting of the wood from the premises in dispute continued,

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and the appellant's counsel being it seems somewhat doubtful whether it could lawfully hold more than 1,440 acres, or at least being willing to conform to what they supposed to be the views of the District Court on this subject, had a survey made of their land following the fence which inclosed their possessions for a greater part of the way, but running across the inclosure at some part of it so as to include in their survey something less than 1,440 acres. The appellant then on the fourteenth day of September brought a new action against John Williams and all the other persons who had filed an answer in the first suit, and also John Doe and Richard Roe, for trespasses committed within this last survey. John Williams and all the other defendants except John Doe and Richard Roe put in a joint answer. The answer sets up substantially the following defenses :

First.—It denies the plaintiff ever was the owner of or in possession of the land upon which the trespass is alleged to have been committed.

Second.—It alleges the plaintiff is a corporation created in California for mining purposes ; that by the laws of the State giving it an existence it can only acquire, hold or possess such real estate as is necessary to carry on its legitimate business, and in no event can hold more than 1,440 acres ; that no part of the land in controversy was necessary for the corporation to carry on its legitimate business of mining.

Third.—The facts and circumstances attending the bringing and prosecution of the former action as we have heretofore stated them.

The appellants in their second (present) action also pray for an injunction restraining waste during the pendency of this suit, and state facts sufficient to entitle them to that remedy if they can maintain their action for trespass. The District Judge granted a restraining order and the defendants were cited to appear and show cause why a temporary injunction should not be granted. Upon the hearing of this application the Judge below refused to grant the injunction, and the plaintiff appeals from that order, as he may do under the provisions of our Practice Act. On the hearing it was clearly shown that appellant for some time past had by its agents

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been in possession of certain buildings within an inclosure of some sixteen hundred and odd acres, and through its agents was claiming and asserting a title to the whole of the inclosed land. There was no dispute about the entry of the defendants. The only contested points were: Could this corporation lawfully hold 1,600 acres of land, or having unlawfully attempted to hold 1,600, could it abandon its claim to 200 after the defendant's entry and still successfully assert its right of possession to the remaining 1,400? Second: Was not the plaintiff barred from proceeding in this case by the proceedings had in the suit brought in August?

It seems to be conceded by both sides that a corporation formed in California for mining purposes may hold land in this State. This we believe is a doctrine too well established to be discussed here. But, say respondents, such corporation must in no case hold more land than the nature of its business and its absolute necessities require; nor in any case more than 1,440 acres.

Let us examine these qualifications of the general rule. Our statute in regard to corporations limits their holding of land to such quantity as may be necessary for the purposes of the corporation. The California Act of 1858, under which we presume this corporation was formed, contains the same limitations, and also the further limitation that no such corporation shall in any case hold more than 1,440 acres.

Although our Act only refers in terms to those corporations created under the general incorporation law of this State, still the spirit of the Act would seem to extend to all corporations; and probably the Courts of this State would in a proper case hold that no corporation could legally acquire or hold more land than was necessary for the business and purposes of the corporation. Whether that limitation as to 1,440 acres which the California Legislature has chosen to impose on all corporations in that State, would have any weight or effect on the decisions of Courts in this State, is far more questionable.

If we permit a foreign corporation to conduct mining operations and acquire real estate within our limits, it appears to us our Legislature is the proper power to limit that corporation in the extent of its acquisitions, and not the Legislature in another State which

grants the charter. If the Legislature of another State were to create a corporation to conduct mining operations in this State and authorize it to buy and hold a million acres of land, our Legislature might prohibit their buying more than one acre. On the other hand, if they were by their charter allowed to hold only one acre of land, our Legislature might (by a general law, for it can pass no special law in regard to corporations) extend the right to buy a million acres. If under such a law the corporation purchased more than its original charter allowed, it might be amenable to some proceedings on the part of the State or Government granting the charter, but it would not whilst it remained a corporation lose its land under our laws.

Whatever might be the determination, in a proper case, of this question as to the quantity of land which a California mining incorporation may hold in this State, we do not think it arises in this case. It is a well settled rule that corporations created by legislative enactment have only such powers as are specifically granted or are necessarily incident to those granted; and if they attempt to exercise powers foreign to those granted their acts have frequently been held void. But there is a difference between exercising powers entirely foreign to the nature and object of a corporation, and exercising legitimate powers to an improper extent. A mining corporation, for instance, as such, has no right to enter into an insurance business, and probably a policy of insurance issued by such a corporation would be held void on its face, and the party insured would perhaps be entitled to recover back the premium paid. But a corporation for mining purposes must almost of necessity have some real estate. Probably no such corporation exists on the Pacific Coast without owning or claiming some land. A deed, then, to a mining corporation, is not void on its face. If they have violated the law in taking a greater quantity of land than is allowable, then they have committed a wrong, not against any particular individual, but against the whole community, and this wrong can only be inquired into by a proceeding on the part of the State. Their deed to the land, if they buy it from one having title, or their possession if they only derive title from occupation, gives them a right to hold against all the world except the State.

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It seems to be admitted by respondent, that if this mining company required that much for the convenience of conducting its business, it might hold to the extent of 1,440 acres, but no more. Now suppose the corporation did actually require at least 1,440 acres of land; that for the purpose of prosecuting its legitimate business it entered upon a piece of public unoccupied domain, intending to occupy just such quantity as the law allowed, say 1,440 acres, but in making its inclosure it took in ten acres or one acre over 1,440 acres; would this forfeit its right to all real estate it held in Nevada? Would it, by taking up 1,450 acres of the public domain forfeit not only the land last taken up, but also the previously acquired mining ground? If there is to be any forfeiture, it appears evident to us that it must be either the whole of the real estate of a corporation which acquires too much land, or it must be only the surplus, over and above the quantity allowed by law. We think to hold that a mining corporation which is legitimately in the possession of a mining claim should forfeit the same, if perchance it should buy an acre of land that it did not need for its legitimate business, would be a harsh and unwarrantable doctrine, not sanctioned by any law or decision.

If, then, a corporation does not lose all its rights, so far as real estate is concerned, by acquiring an excess of land, no individual can be protected in trespassing on any part of the realty held by such a corporation. For if such corporation held two hundred acres when it was entitled to hold only one hundred, and A is protected in trespassing on one hundred of the two hundred, B would be equally entitled to protection in trespassing on the other hundred; so that under pretense of taking from the corporation its surplus lands, several trespassers could take it all. In this case, if defendant had a right to take 1,600 or 1,700 acres of inclosed land, they had an equal right to take the mining ground of appellant, if it has any.

Respondents certainly can derive no advantage or protection from the survey made by them. The law of 1861, under which these surveys were made, is clearly repealed by the eighth section of the Act of March 9th, 1865, in regard to possessory actions.

That portion of Section 8 in the latter Act which uses this lan-

guage, "So far as the same are inconsistent with or repugnant to," refers to "other Acts or parts of Acts." It has no reference to the tenth and thirtieth sections of the Act of 1861. They are repealed absolutely and unconditionally. The conclusion at which we arrive is that respondents were guilty of a naked, unjustifiable trespass.

The only remaining question is, what is the effect of the pendency of the proceedings in the other action in this case? Without stopping to inquire as to the question of identity of parties, we will say, the pendency of the other action cannot be pleaded in abatement of this, because the damages recoverable in the other action would be limited to those which accrued previous to filing the complaint. Here there were damages alleged at a time subsequent to the filing of the former complaint.

These damages may be recovered in the latter action, notwithstanding the pendency of the former. A plea in abatement must go to the entire cause of action or it is not available.

Here the plea or answer only reaches to a part of the cause of action.

If the former action has been tried on its merits, or is still pending when this latter action is brought to trial, the appellant, in its proof, may be confined to what was done after the filing of the first complaint.

The ruling of a Court in regard to a mere interlocutory order or decree, cannot be held to be *res judicata*. Although the District Court refused to grant a temporary injunction pending the first action, it is not certain that the same Court may not on the final hearing grant a perpetual injunction. It is only final judgments or decrees that can be pleaded as *res judicata*.

The order of the Court below refusing to grant a temporary injunction is reversed. That Court will make an order granting a temporary injunction, pending the trial of the cause, upon the appellant's giving a bond or undertaking to pay all damages arising from such injunction, if it be finally determined that it was not entitled to the same. The appellant will also have judgment for its costs in this Court.

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THEODORE WINTERS v. ALFRED HELM AND OTHERS,
THOMAS J. BEDFORD AND MARTHA A. BEDFORD,
APPELLANTS.

When one obtains possession of property by a fraudulent use of a rule of Court, it is the duty of the Court to remove him and restore the possession to the former occupant.

Even if the possession is voluntarily surrendered to the claimant under the rule, to hold whilst the occupant goes to consult his principal or legal adviser as to whether it is his duty to surrender the property in obedience to the rule served, and the party who thus gets temporary possession by means of and in consequence of the rule, afterwards fraudulently refuses to yield up the possession thus obtained, it is equally the duty of the Court to restore the possession.

When the Court restored the possession thus fraudulently obtained to a corporation upon a petition signed and sworn to by the party actually ousted, this Court will not reverse the judgment because of their being no sufficient evidence that the party actually ousted was the agent or servant of the alleged corporation.

The person who obtained or retained possession by fraud was properly ousted, and it does not lie in his mouth to say the wrong person was put in possession.

APPEAL from the District Court of the Second Judicial District, Hon. C. N. HARRIS, Judge of the Third Judicial District, presiding.

Ellis & Sawyer for Appellants, filed the following points:

There is no evidence in the case showing or tending to show that there is such a corporation as the "Lake Bigler Road Co."

There is no evidence before the Court that H. M. Yerrington or R. A. Winn, witness, was agent, or in the employ of Lake Bigler Road Co.

There is no evidence tending to show that Lake Bigler Road Co. was put out of possession under and by virtue of any order of any Court.

The deed in this statement mentioned was improperly admitted in evidence, not being stamped.

The Lake Bigler Road Company is incapable of holding or exercising a toll road franchise.

One person not a party to a suit cannot in such suit have *such order* against another person also not a party to the suit. (1 A. K. Marshall, 246.)

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The original elisor was the proper party to serve all papers in the pending suit, and it was error to appoint another to serve an order therein without cause shown, to supersede him.

The order made was radically different from that against which appellants were cited to show cause.

The appellants did show cause why said rule should not be made absolute, and it should have been discharged.

It was essential for the Lake Bigler Road Company to show *upon the hearing* of its existence as a corporation, its capacity to take and enjoy and exercise a franchise, and that it has been deprived of this enjoyment by Bedford *et al.* as alleged. This they failed to do.

The right of this corporation to *take and hold a franchise* must first be shown before the doctrine can be invoked, that Bedford cannot inquire *collaterally* as to the necessity of the company's so *holding and exercising this franchise*.

The right of this company to enjoy or take a franchise is a direct and not a collateral inquiry in this case.

It does not appear either in the affidavit of Winn, nor in his testimony, that he was the agent of the Lake Bigler Road Company, a corporation at the time of the alleged ouster. This is fatal.

George A. Nourse, on the same side, argued as to matters of practice in making statements, taking appeals, etc., which are not passed on by the Court; he also suggested, in addition to the points made by his associates:

The appellant Bedford did not obtain possession by means of the writ. The possession was substantially surrendered to him. If Bedford was guilty of any wrong in retaining possession, it does not relate back so as to make the original taking wrong.

Bedford claiming a right to the property, and having been placed voluntarily in possession by Winn, was under no moral obligation to surrender possession. He had a right to retain possession, and let the other side sue.

Robert M. Clarke, for Respondents, filed a brief relating to those matters of practice in regard to statements and appeals which are not passed on by this Court. He insisted this Court must be guided

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by the findings of fact alone for the want of a proper statement on appeal.

Opinion by BEATTY, C. J., LEWIS, J., concurring.

In this case, which was for the foreclosure of a mortgage, a sale of a two-fifths interest in a certain toll-road was ordered. Martha A. Bedford, wife of Thomas J. Bedford, became the purchaser of that interest. After purchase, she and her husband applied to the Court for an order to be put in possession of the road. The Court ordered a rule to be served on the defendants and all persons claiming under them, requiring the road to be by them given into the possession of Bedford and wife, or else that they should, on a certain day, show cause why a writ of assistance should not be issued to place them in possession. Thomas J. Bedford, one Griswold (a person in his employ) and Joseph I. Hatch, who had been appointed elisor in this case, went with a copy of this rule to the toll-house, where they found one Winn in possession of the house and receiving tolls. The rule was served on Winn, and after such service he asked advice of the elisor as to what he should do. The elisor told him it might be a contempt of Court not to deliver up possession, but he did not know; he must decide for himself. Winn then asked the elisor to keep the toll-house and collect the tolls, whilst he went to town to inquire what it was his duty to do. This the elisor declined to do. He then asked Bedford if he would collect the tolls whilst he went to town to inquire what he must do. Bedford consented. Winn went to town, and was informed that it was not his duty, under such a rule, to deliver possession. He then went back and sought to regain possession; but Bedford refused to surrender, and he and his man Griswold kept possession of the front room of the toll-house, and continued to collect the tolls. In the meantime, whilst Bedford was in possession, the Court set aside and annulled the rule or order which had been made on the application of the Bedfords. When this was done, Bedford was notified of the fact, and again requested to surrender the possession. This he refused to do. The Lake Bigler Road Company, claiming to be a corporation, by its attorneys, then moved the Court to be restored to the possession of the property of which Bedford had got posses-

sion, as before stated. Their application was based on an affidavit made by Winn, who was in possession at the time Bedford got in.

On the hearing of this motion, the Court below ordered the possession to be returned to the Lake Bigler Road Company. From this order, Bedford and wife appeal. Many objections are urged to the action of the Court below. One is, that Bedford did not get possession of the road by means of the rule of Court served on Winn, but that the possession was voluntarily surrendered to him. That Bedford, being placed quietly in possession of property in which he claims an interest, cannot be turned out upon summary process without a regular action against him. Another objection is, that the Lake Bigler Road Company did not show that it was a corporation, or in fact that there was any such company in existence; that it did not show that Winn was its agent, or that it had any possession or any right to the possession of the road.

On the first point, we think the evidence that a fraudulent use was made of the process of the Court to obtain possession of the toll-house is perfectly conclusive. The elisor, instead of going to the defendants in the suit, who are the parties primarily mentioned, goes to the toll-keeper, who could not be supposed to know anything about legal matters connected with the road, to serve the rule. He is accompanied not only by Bedford, but by a third party in his employ to make the array more formidable. Then he is told "that it might be a contempt of Court not to deliver up possession." These are certainly very strong circumstances showing a preconcerted design to impose upon and frighten the toll-keeper out of possession. But this is not all. Bedford is asked if he will not collect the tolls whilst Winn goes to inquire what he must do. He says that he will. Such acceptance of the possession by Bedford certainly created, on his part, an implied promise to redeliver the possession to Winn if he concluded, after asking advice, that it was not his duty to surrender the possession. If Bedford intended when he took possession not to comply with this implied promise, it was a palpable fraud. If he did not so intend at the time, but afterwards conceived the idea of retaining the possession, then the execution of that afterthought was equally a fraud. We cannot see that it would make much difference in this case whether the

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possession was fraudulently obtained or only fraudulently retained. It is apparent enough that Bedford was in possession at the time this order was made, and that possession was the joint result of his fraud and the improper use of the process of the Court. That being the case, it was the duty of the Court to remove him with all convenient promptitude.

As to the other objection, it is true the Lake Bigler Road Company hardly made any showing as to its own existence. But there are two facts which do appear in relation to this company: First—There is a deed introduced which purports to convey this road or certain interests therein to the Lake Bigler Road Company. Second—Winn, who was the party actually deprived of the possession, makes the affidavit to the petition praying for the order against Bedford to return the possession to that company. One thing is certain: whoever was entitled to possession of this road, Bedford was not. Of course, by this we do not mean to express any opinion about his legitimate rights, but only that it was not right for the Court to allow him to obtain any advantage from the abuse of the rule made by the Court.

Bedford then having no right to retain possession under the circumstances, the Court, if it was not satisfied as to the showing of the Lake Bigler Road Company, might with propriety have ordered the possession back into the hands of Winn. But Winn himself had made the affidavit to the petition, and we cannot see that the Court under such circumstances did wrong in making the order in the form in which we find it.

Bedford is not in any legal sense injured by the order. He has no right to complain that the Court has deprived him of any benefit he may have expected to derive from an abuse of its process.

A number of questions in regard to practice and other matters are raised in this case which we do not deem it necessary to decide: for, whether we consider the case as standing on the affidavits or on the affidavits and oral testimony introduced in aid thereof—whether we take the case as shown by the finding of facts by the Judge who heard the motion or as shown by appellant's statement on appeal—we arrive at the same conclusion. The process of the Court having been improperly used by Bedford to obtain possession,

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he has no right to complain of being turned out by a summary order. If the order placing the Lake Bigler Road Company in possession was an improvident one (and as to that we express no opinion) some other person has been injured—not the Bedfords.

Judgment of the Court below is affirmed.

JOHNSON, J., being interested in the event of this suit, does not participate in this decision.

LAKE BIGLER ROAD CO., APPELLANT, v. THOMAS BED-
FORD ET AL., RESPONDENT.

To file an answer to a complaint and then move for judgment on the pleadings is an irregular practice, and ought not to be encouraged.

If the complaint is defective, the proper mode to reach it is by demurrer; then, if the defect be amendable, the plaintiff has, as he ought to have, the opportunity to amend.

If however the complaint is fatally defective in not stating a cause of action, such a judgment must be sustained.

A bill to quiet title will not be sustained in favor of a party not in possession. So too a complaint for the recovery of possession of property will not be sustained where it shows on its face the pendency of another proceeding for the same purpose.

APPEAL from the District Court of the Second Judicial District, Hon. C. N. HARRIS, Judge of Third Judicial District, presiding.

The facts are fully stated in the opinion of the Court.

R. M. Clarke, for Appellant, made the following points:

The Court erred in giving judgment for defendants upon the pleadings.

The complaint states a good cause of action, and states it with sufficient certainty and formality.

Unless prohibited by law, a corporation may hold any property that a *natural* person can hold. (*Angell & Ames on Corp.* 65; 2 Kent, 277, 281; *New York Dry Dock v. Hecks*, 5 McLean, 114.)

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The Court will presume, in the absence of proof, that the corporation took the road in the exercise of its legitimate functions. (3 Wend. 94; 16 Mass. 102; 7 Cow. 540; 5 McLean, 115.)

It was not necessary for the plaintiff to allege or prove that the road was required for the purposes of the corporation. This is presumed until the contrary appear. (5 McLean, 115; 15 Pick. 310; 16 Conn. 420; 19 John. 347; 11 John. 517.)

The plaintiff's corporate existence being admitted, it has, as a corporation, the right to purchase and hold the property in question.

First.—As the assignee of *Helm* under the Act of December 17th, 1862, granting the franchise.

Second.—As a common law corporation and common law right.

Third.—As a property required for the purposes of the corporation. (Sec. 4, Sub. 3, Act 1862, 163.)

The right of the corporation to hold the road and enjoy the franchise is not, under the pleadings, and cannot become between the parties the subject of legal inquiry.

The State alone, upon a direct proceeding upon information or *quo warranto*, can contest or question the plaintiff's right to exercise a public franchise. (*Natoma W. & M. Co. v. Clarkin*, 14 Cal. 552; 3 Rand. Va. 136; Ang. & Ames on Corp. Secs. 152-153.)

The defendants are *naked trespassers*, without even a color of right to take tolls or exercise the franchise. They do not claim to hold but two-fifths (2-5) interest in the road. And the title by which they claim to hold is void on its face. No interest in a franchise can be sold at judicial sale, and therefore the defendants acquired no interest by their purchase. (5 Cal. 470; 7 Ib. 286; 24 Ib. 474.)

Geo. A. Nourse and Ellis & Sawyer, for Respondents.

1. There is no statement on appeal in the case, consequently nothing is before this Court but the judgment roll. (4 Cal. 215, 244, 284; 8 Ib. 322; 10 Ib. 193, 481; 11 Ib. 340, 391; 12 Ib. 280; 15 Ib. 198; 20 Ib. 177; 25 Ib. 488; 27 Ib. 109.)

2. The judgment roll discloses no error. In the absence of anything to show error, it is presumed that the judgment of the Court below is correct. (2 Cal. 100; 3 Ib. 426; 5 Ib. 151, 321; 7 Ib. 292; 10 Ib. 50; 2 Nev. 55, 133, 271.)

Even if there were no *presumption* in favor of the judgment of the Court below, it must be sustained; because the complaint states no cause of action in that—

The corporation plaintiff is alleged in the complaint (and the answer does not deny it) to be incorporated under the general Corporation Law of this State, passed in 1862, and amended in 1864.

No corporation can be incorporated under those laws except for the purposes therein specified, to wit: "Manufacturing, mining, milling, ditching, mechanical, chemical, building, and farming purposes." (Laws of 1862, p. 162, Sec. 1; Laws of 1864, p. 49, Sec. 1.)

Corporations incorporated under said Acts are only authorized thereby to "purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require." (Laws of 1862; p. 163, Sub. 3, Sec. 4.)

A corporation incorporated under said Acts, or similar Acts, have no powers except such as are granted them by the statutes under which they are incorporated. The *general* powers belonging to a corporation at common law, do not belong to a corporation incorporated under a special charter, or a general statute for the creation of corporations, when such special charter or general statute undertakes to specify the powers to be exercised by the corporations created thereunder or thereby. In such case the maxim applies in its fullest force, *expressio unius*, etc." (Angell & Ames on Corp., Sec. 111, and cases cited.)

A toll road franchise, toll road and toll house, (such as this suit is brought to recover possession of) cannot be "such real or personal estate as the purposes of such a corporation shall require."

Even had the plaintiff shown by the other allegations of the complaint a *prima facie* cause of action, it has, by its narrative of the alleged proceedings upon the same subject matter in the Court below in another proceeding, set up a full and complete defense to this action.

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Opinion by BEATTY, C. J., LEWIS, J., concurring.

The complaint in this case alleges that the plaintiff is a corporation duly incorporated under the general incorporation laws of the State.

That Alfred Helm, in the month of December, A.D., 1862, obtained a legislative grant to himself and assignees of a certain toll-road franchise. In the spring of 1863 he assigned four-fifths of this franchise to certain associates, and they and he conveyed the whole to three certain trustees to be held in trust for the Lake Bigler Road Company.

Subsequent to this conveyance to the trustees, Rice and Helm (each of whom were grantors in this trust deed) mortgaged two-fifths of the franchise to Theodore Winters, to secure a debt due by themselves and others to him. This mortgage was foreclosed, the two-fifths sold, and by several mesne conveyances came into the hands of Martha A. Bedford, wife of Thomas J. Bedford. The complaint then goes on to recite the facts and circumstance of the order made on the defendants in the case of *Theodore Winters v. Alfred Helm* and others, to deliver the possession of the toll-road to Bedford, or show cause why it was not done, and the proceedings which took place under that order, the steps taken by the plaintiff to be restored, etc., all of which will more fully appear in the statement of the case just preceding this. It alleges that no title passed by the pretended sale in the foreclosure suit of *Winter v. Helm* and others; that the Bedfords had appealed from the order restoring the Lake Bigler Road Company to the possession of the road; that they were collecting the tolls, letting the road go to waste for the want of repairs, etc.

The complaint first prays for a judgment to quiet title; second, for judgment for possession; and third, for the appointment of a receiver.

The defendants first filed an answer admitting some of the allegations of the complaint and denying others, and then without interposing a demurrer, moved the Court for judgment for the defendants on the pleadings.

In the written notice or statement which is filed, the ground

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taken is substantially that the complaint does not show that the plaintiff is a corporation capable of holding a road franchise.

This motion was sustained by the Court below and the plaintiff appeals.

This was an irregular practice, and if we sustain the judgment in this case it is only because it is clear that the complaint fails to state facts sufficient to constitute a present cause of action.

If a complaint is defective the proper practice is to demur to it, and if the demurrer is sustained, then either one of two things takes place: the plaintiff amends, if it be amendable; if not, judgment goes against the plaintiff as a matter of course, and this either ends the case or brings it up fairly to this Court on the legal issue. But if an answer is put in and the Court gives judgment upon the pleadings, it either does or does not allow the answer to have some weight in deciding that question. If it does give any weight to the answer it is certainly wrong; for the answer, so far as it denies matters stated in the complaint, puts these matters in issue. So far as new matter is stated, that also is put in issue by operation of law, and the Court has no right to suppose before trial that any of those issues will be found against the plaintiff. If on the other hand the Court acts solely on the allegations of the complaint, that should be done on demurrer, leaving the plaintiff the opportunity to amend if it be only defective in a matter that is amendable. When a judgment is given against a plaintiff in this irregular way, if the complaint is clearly defective in not stating facts sufficient to constitute a cause of action, we will as a matter of necessity be compelled to sustain said judgment. But if there be any doubt as to whether it does fail to state facts sufficient to constitute a cause of action, or only fails to state them with sufficient precision, we will be much inclined to resolve those doubts in favor of plaintiff, and to send the case back, with leave to amend the complaint without costs.

In this case, however, we see no chance for the appellant to amend. As a bill to quiet title it was filed prematurely before plaintiff was restored to possession. As a suit to recover possession it was unnecessary, as by their own showing they must be restored to possession under the order of Court in the case of *Winters v. Helm and others*. For the appointment of a Receiver it

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was not necessary. During the pendency of the appeal from the order restoring the possession to the Lake Bigler Road Company, the Court could have appointed a Receiver to preserve the property without the bringing of this suit. (See Section 143 of our Practice Act.)

As the question is not properly before us, we express no opinion about the power of this corporation to take or hold a toll-road franchise.

Judgment of the Court below affirmed.

Having an interest in some of the matters at issue, JOHNSON, J., does not participate in the decision.

PHOEBE SHECKLES, RESPONDENT, v. N. B. SHECKLES,
APPELLANT.

An application for a change of venue to suit the convenience of witnesses should not be denied because the application was not made until after the answer was filed and the cause set for trial. Nor is it necessary that the answer should make any allusion to the facts on which such application is based.

The fact that the case had been set down for trial on a certain day should not interfere with an application for change of venue to suit the convenience of witnesses, unless there had been delay in making the application, or the parties had already prepared for the trial by subpoenaing witnesses, etc.

When an allowance is made to a wife for expenses of procuring attendance of witnesses in one district, and the case is afterwards removed to another district where all the witnesses reside, it would be proper for the Judge of the latter district to review the allowance made, and modify it according to his views of the necessary costs in his district.

AN application was made to this Court for a writ of *certiorari*, requiring the Judge of the Fourth Judicial District of the State of Nevada, the Hon. W. Haydon, to show by what authority he had made an order on N. B. Sheckles to pay over a certain amount of money to respondent, Phoebe Sheckles, and had directed the issuance of an execution to enforce said payment.

The Court granted a rule to show cause why a writ should not issue.

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About the time that N. B. Sheckles obtained the writ of *certiorari* he perfected an appeal from the order of the District Court of the Fourth Judicial District refusing an application for change of venue. By consent of parties, both cases were heard and argued together. The question raised by the *certiorari* was as to whether a Judge could, pending a suit for divorce, make an allowance to the wife, who was plaintiff, and enforce it by execution against defendant's estate. The Court held that such proceeding was regular, but gave no written opinion on this branch of the case. The Court held, as will be seen by the opinion, that a change of venue should have been allowed.

Thomas E. Haydon, for Petitioner and Appellant, made the following points on his motion for writ of *certiorari* :

1st. Because no Court in this State has jurisdiction of an action for divorce from the bonds of matrimony, and of any proceedings based upon such action.

2d. Because the first section of an Act entitled "An Act amendatory of an Act relating to Marriage and Divorce, and approved November 28th, A.D. 1861, being Chapter XXXIII of the Laws of Nevada," passed in Senate on the seventeenth and in Assembly on the eighteenth of January, A.D. 1867, so far as it authorized a Judge or Court, on motion and notice, to require a husband to pay sums to wife to enable her to carry on or defend a suit, is void, because it deprives a man of his property without due process of law.

3d. Because the defendant resided in Douglas County, and the plaintiff had not resided in Lyon County for a period of six months before the commencement of her suit on the eleventh day of June, A.D. 1867.

4th. Because the complaint in said cause, even if the Court had jurisdiction, does not state facts sufficient to constitute a cause of action for divorce.

He also referred to the following authorities :

Residence and domicil same. (See Burrill & Bouvier, respective definitions ; Story on Conflict of Laws, Secs. 40, 44.)

Where wife is plaintiff, not admissible to grant alimony. (Bishop, 576 ; *Shelton v. Pendleton*, 18 Conn. 417.)

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Jurisdiction of divorces granted by express statutes. (Bishop, Secs. 21, 264; *Richardson v. Richardson*, 2 Mass. 152; Bishop, latter part of Sec. 742, and numerous cases there cited in Note 1.)

Cruelty. (Definition of Bishop, Secs. 454, 459.)

The acts must be pleaded, and are not mere evidence. (Bishop, 458.)

Alimony not granted upon a defective complaint. (Willard's Equity, 66; *Rose v. Rose*, 11 Paige, 166; *Wood v. Wood*, 2 Id. 454; 8 Wendell, 377; Bishop, 581.)

No brief on file by respondent.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

The venue in this case should have been changed upon the showing made by the defendant. The plaintiff herself declares that her witnesses reside in Douglas County; the defendant swears that all of his reside in that county; and the Judge below seems to have been perfectly satisfied that the convenience of witnesses demanded a change; but it was refused, because, as stated by the Court below, the defendant "having filed his answer to the merits and not objecting to the venue until after the case was set for trial, he therefore waived his right to the change for the accommodation of witnesses." And to sustain this ruling, the following authorities are invoked: *Tooms v. Randall*, 3 Cal. 438; *Keyes v. Sanford*, 5 Id. 117; *Parke v. Freer*, 9 Cal. 642.

The mere fact that the defendant filed his answer to the merits certainly should not, in a case of this kind, interfere with his right to a change of venue, if the convenience of witnesses required it. When the action is brought in the wrong county—for example, in a county where none of the parties reside—and a change of venue is sought on that ground, and that alone, the Supreme Court of California, in the cases referred to, seem to have held that such fact ought to be taken advantage of in the answer, and that it ought to be treated as waived if not so taken. But in this case the defendant certainly does make the objection—that is, he denies that the plaintiff is a resident of Lyon County, and avers that he himself is a resident of Douglas County. The fact, if established, would at least make it the duty of the Court below to transfer the case to the

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proper county. Actions of this character can only be brought in the county "where the cause for the divorce shall have occurred, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided for six months before suit be brought." The jurisdiction of the District Court over this case is based exclusively upon the fact that the plaintiff had resided in Lyon County for a period of six months prior to the institution of this suit. That fact is alleged in the complaint, and specially denied in the answer. Thus the right of the District Court of Lyon County to try the cause is directly put in issue.

But it is of no consequence, so far as this case is concerned, whether that fact was sufficiently presented in the answer or not. Its entire omission could in no wise affect the right to have the venue changed for the convenience of witnesses. That is a fact not necessary to appear in the pleading. Section 21 of the Practice Act provides that "the Court may on motion change the place of trial" * * * "when the convenience of witnesses and the ends of justice will be promoted by the change." It is clearly shown and not contradicted that the witnesses who will be called on in this case all reside in Douglas County, and the Judge below concedes that the "convenience of witnesses would be promoted" by transferring the case to Douglas County; but it is claimed there was delay in making the application, and for that reason, if no other, the defendant's motion should be denied.

The record presented to us certainly discloses no serious laches on the part of defendant. The summons, it appears, was served on the twenty-fourth day of June. The answer was filed July 24th, which was within the statutory time, and this motion for change of venue was first made on the thirtieth of September, and afterwards renewed on the fifth of October by consent of counsel. Thus, only about two months after issue joined, and at the first Term of the Court thereafter, the motion is made. For aught we know from the record, the case might have been tried as soon in the County of Douglas as in the County of Lyon. That the motion was not made until after the case was set for trial should not of itself have any

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influence with the Judge in denying the application. If it was made before the witnesses were subpoenaed and preparation for trial had been made, the motion should have been granted as well before as after the setting of the case, unless it appeared that there had been an unjustifiable delay in making it, whereby, if the change were made, the other party would be prejudiced. There is really no significance in the mere fact that the case is set for trial beyond this, that usually when a case is set, all the preparations are made to try it in that county. If no such preparations have been made, and there has been no inexcusable delay, the application should be granted, if by so doing "the convenience of witnesses and the ends of justice will be promoted." The changing of the venue is a matter which rests very much in the discretion of the Judge at *nisi prius*, and we are very loth to interfere with his rulings; but as a case for a change of venue is here clearly made out, and it is denied by the Judge below, as it appears, simply because the motion was not made until after the case had been set for trial, we think the case is clearly one calling for the interference of this Court.

The order refusing a change of venue must be reversed, and the case transferred to Douglas County. And as the change is to a county where all the witnesses reside, it will not be improper for the Judge who tries the case to reconsider the allowance for alimony and award such sum as may, under all circumstances, be deemed necessary.

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THE STATE OF NEVADA, RESPONDENT, v. JOHN MILLAIN, APPELLANT.

At common law a Grand Juror was not precluded from finding an indictment because he was either a witness or prosecutor.

Our statute fixes distinctly what shall be the disqualifications of a Grand Juror, and nothing else than what the statute prescribes can disqualify one from acting as such.

A prosecutor is "one who prefers an accusation against a party whom he suspects to be guilty." A party who appears in response to a subpoena is not a prosecutor, but only a witness.

A jury drawn whilst the Court was in session, in the presence of the Court and its officers, must be held to have been drawn in open Court, whether it was done in the room where the Court usually sits or in any other room of the Court House building.

A mere suspicion on the mind of a juror that the defendant is guilty does not disqualify him from sitting on a petit jury, especially if that suspicion mainly arises from the examination to which he is subjected by the prisoner's counsel touching his qualification as a juror. It is only an unqualified opinion that disqualifies.

"Unqualified opinion or belief" commented on.

The action of the lower Court in granting or refusing a change of venue is a matter of judicial discretion. If that discretion is abused it becomes the duty of an appellate Court to afford relief.

Two circumstances should influence a Court to grant a change of venue. One, the impossibility of obtaining a fair and impartial jury; the other, such a state of public excitement against the prisoner as would be likely to overawe and intimidate even a fair jury.

The fact that threats were made against the prisoner by parties who were not shown to have been either numerous or influential, was not sufficient to show there was danger of the jury being intimidated.

Where a defendant on his motion for a change of venue showed a state of facts strongly tending to the conclusion that he could not obtain a fair jury, it was not error in the Court to withhold its decision upon the motion until an examination was had of the jurors then in attendance, and being satisfied from such examination that a fair jury could be obtained, to refuse to make the order for change of venue.

The short form of indictment used in this case held to conform to the requirements of the statute.

That clause in the Constitution of the United States which declares "No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment," does not restrict the State Legislatures in prescribing the form of the indictment. It only requires that a Grand Jury should in some form express its approval of the prosecution before a party can be put on trial for such offense.

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Under the statute of this State any indictment which is good to sustain the simple charge of murder, is equally good to sustain a conviction of the higher crime of murder in the first degree.

The Legislature has absolute power over the subject of criminal proceedings, and may prescribe such forms of proceedings, indictment, etc., as it sees fit, except in those particulars where its power is restrained by some clause in the State or National Constitutions. There is nothing in either of those instruments which can prevent the Legislature from enacting that a party indicted for simple murder may be found guilty of murder in the first degree.

Upon philosophical principles indictment for unlawful homicide should designate the grade of the offense committed, distinctly stating the facts which separate the offense charged from the next lower grade; but the Legislature may in its discretion dispense with all such distinctions, allowing a general indictment for unlawful homicide, and requiring the jury to find the grade of the offense in their verdict.

The fact that stolen property is found soon after the felony is committed in the hands of a party accused of the felony is some evidence of his guilt. But this proof may be greatly strengthened or weakened by the character, amount and value of the property; the circumstances, means, occupation, etc., of the defendant.

It is not error to charge a jury that they must find the prisoner guilty of murder in the first or second degree, or acquit, where there is no testimony offered which in any degree tends to show any fact or circumstances which could reduce the offense to manslaughter.

A charge in the following language if not correct is too favorable to defendant: "If you believe from the evidence that about the nineteenth day of January last, at Virginia, Storey County, the defendant with malice aforethought, either express or implied, and with deliberation and premeditation, did unlawfully kill Julia Bulette with intent to take her life, it will constitute murder of the first degree, and you should so find; otherwise you will acquit."

The common law rule that the possession of goods recently stolen shall be held as sufficient evidence to show that the accused is guilty, until he gives some explanation of that possession consistent with his innocence, is not weakened but rather strengthened by our statute allowing the accused to testify in his own behalf.

Where there is no testimony tending to show the defendant guilty of an offense of a lower grade than the one charged, it is not error to instruct the jury they must find the prisoner guilty as charged or acquit him. If however there is any testimony tending to reduce the offense to a lower grade, the whole question should be submitted to the jury.

A mere expression of opinion by the Judge about evidence is not error when the jury are distinctly told they are the sole Judges as to the facts about which the opinion is expressed.

The word "inferred," as used in instruction, is synonymous with "implied" as used in the definition of murder.

Length of time for deliberation is not an essential ingredient in murder in the first

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degree. It is sufficient if the design to murder was formed before the striking of the fatal blow.

Where there is a preconceived design to commit some felony other than murder, and the result of the attempt, unintentional on the part of the felon, proves fatal to a human being, this premeditated felony would make *malice aforethought* at common law. But this would not be willful, deliberate, premeditated killing under our statute, because of the absence of intent to take life.

he following definition of reasonable doubt is not erroneous: "By reasonable doubt is ordinarily meant such a one as would govern of control you in your business transactions in the ordinary pursuits of life."

When an instruction has been given by the Court in clear and intelligible language on any point in the case with all proper qualifications, it is not error to refuse to repeat the same instruction in detached parcels, not properly qualified and made applicable to the state of the evidence before the jury.

Per JOHNSON, J.—As the law formerly stood, six grounds of challenge were allowed to Grand Jurors. The three last were as follows: "Fourth, that he is a prosecutor upon a charge or charges against defendant; fifth, that he is a witness on the part of the prosecution and has been served with process, or bound by an undertaking as such; sixth, that he has expressed a decided opinion that the defendant is guilty of the offense for which he is held to answer." The insertion of the fourth and fifth clauses shows a distinction was taken between witness and prosecutor. The amendment of the law by striking out fifth and sixth clause, cannot be held to have added anything to the scope and effect of the fourth clause.

Even under the former law the objection would have been insufficient. The witness did not show that he had formed a *decided* opinion of prisoner's guilt. Neither is it shown that he was subpoenaed or otherwise bound to appear as a witness for the prosecution, nor in fact does it appear he was sworn as a witness for prosecution.

A challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge or other facts on which the challenge is based.

Can this Court reverse a judgment in a criminal case because the evidence is *insufficient* to sustain the verdict? If there be any evidence, does it not become a matter of fact and not of law merely?

Dissenting opinion, per LEWIS, J.

It is error for a Judge to give his opinion to the jury as to the weight or sufficiency of testimony. In a trial for murder a Judge should not give it as his opinion to the jury that they should find the prisoner guilty of murder in the first degree, or acquit. The grade of the offense is a question of fact which should be left entirely to the jury.

When a killing has been shown, the presumption arises that a murder has been committed. But there is no presumption that it is murder in the first degree in a case of this kind. If the defendant claims that it is only manslaughter, the proof devolves on him to show the circumstances, thus reducing the grade of offense. If the prosecution claims that it is murder in the *first degree*, it devolves upon the State to show the aggravating facts.

An instruction in the following language is erroneous: "The testimony in this case tends to show the property of the deceased, or some portion of the same, in the possession of the defendant at a time subsequent to the alleged murder, and at quite a recent date." This instruction assumes that the property found was, or had been the property of deceased. The expression "tends to prove" only applies to the tendency of the evidence to show when the property was found, but does not apply to questions of ownership.

THIS was a trial for murder in the First Judicial District, Storey County, Hon. RICHARD RISING, presiding.

The facts are fully stated in the opinion of the Court.

C. E. DeLong, for Appellant, filed a brief which, owing to the importance of the principles involved and the interest felt by the community in this case, we here insert without alteration, except that the preliminary statement of facts is omitted—the same appearing in the opinion of the Chief Justice.

"It is good cause of exception to a grand juror, that he has formed and expressed an opinion as to the guilt of a party whose case probably will be presented to the consideration of the grand inquest." (*People v. Jewett*, 3 Wend. 313; citing 6 Wend. 386; Wharton Am. Crim. Law, 120; 6 Serg. & Rawle, 395; Burr's Trial, 38.)

"By the common law the grand jurors are to be *good and lawful* men—that is, men free from all objections, and who might serve as petit jurors in the case." (See 1 Chitty Crim. Law, 307.)

"There exists the same right for challenging for favor the grand jury as the petit jury." (1 Burr's Trial, 38.)

By statute of this State of 1866, p. 49, challenges to individual grand jurors are limited to four, provided that act be constitutional. The fourth subdivision of that statute reads as follows:

"That he is prosecutor on a charge or charges against the defendant." The question for consideration is: What did the Legislature mean by the term "prosecutor"? It is quite clear that they did not mean the people of the State, in whose name all criminal proceedings are prosecuted, nor the prosecuting attorney of the county; but did mean such person or persons upon whose evidence the prosecution was to be based.

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There is no reason in the position that any one person, who is to be called as a witness for the State, should be allowed on the grand jury any more than another; hence the statute means, if it means anything at all, to exclude all that class of persons from sitting on a grand jury during the investigation of a case in which they are, or expect to be, witnesses for the State.

D. Black, the grand juror in this panel challenged, clearly comes within the rule; hence the Court erred in not allowing the challenge of this juror.

The common law authorities do not distinguish between causes of challenge to grand or petit jurors. (5 Bacon's Abridg. 353.)

II. The Court erred in not sustaining the defendant's challenge to the panel of trial jurors, as the names were not put in the box and drawn in open Court as required by law. (Statutes of 1866, Sec. 6, p. 192.)

III. The Court erred in refusing to allow the challenges interposed by the defendant for implied bias to the jurors' named, respectively: D. Black, B. Potter, J. Monahan, L. E. Morgan, L. Alexander, and L. D. Young. (Stat. 1861, p. 470, Sec. 340; 6 Cowan, 562, *ex parte* Vermilyea; *People v. Gehr*, 8 Cal. 362; *People v. Reynolds*, 16 Ib. 132; *People v. Woods*, 29 Ib. 636.)

IV. The Court erred in refusing to grant a motion for change of venue. (Stat. 1861, p. 407, Secs. 306 and 308.)

This statute is a literal copy of the California Act, and has been construed by the Courts of that State to vest the Court with a reasonable discretion in the premises; an abuse of that discretion is error. (*People v. Mahoney*, 18 Cal. 186.)

"The Court's discretion is to be exercised within well established legal rules. It is a sound and equitable, and not an arbitrary discretion, it is required to exercise." (*People v. Vermilyea*, 7 Cowen, 398; *Graham & Waterman on New Trials*, 1001; *People v. Webb*, 1 Hill, 182.)

We challenge the examination by the Court of the affidavits filed in support of this motion, and the admissions of record connected therewith made by the prosecuting attorney, by the light of the authorities which we have cited; and with all due respect we assert as a fact, that the books will fail to furnish a parallel case where

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the motion has been refused and the action of the Court sustained.

We especially call the following fact to the attention of the Court, to wit:

No counter showing was made upon this motion, therefore all matters averred in support of it, and admitted in connection with those averments are to be taken strictly as true.

There can be no doubt but that the Court upon the appeal possesses a revisory power over the action of the Court below in this matter. (*People v. Lee*, 5 Cal. 353; 5 How. Pr. 25.)

V. The Court should have sustained the demurrer to the indictment in this action.

We respectfully insist that the indictment is insufficient to warrant or sustain a conviction for felony, wherein it fails to charge Julia Bulette was a human being, or in the peace of the State at the time of the killing, or that the defendant did the act with malice aforethought, express or implied. It does not contain a statement of acts constituting the offense, or the particular circumstances of the offense charged. (Practice Act, 234-6, 286, 430, 431 and 433.)

The indictment should state the facts upon which the prosecution relies, so that the accused may be prepared for his defense. (6 Cal. 236 and 208; Chitty's Crim. Law, 172, 228, and 281; Wharton's Crim. Law, 873; Bishop's Crim. Law, 332; 9 Cal. 31 and 54.)

A party indicted must be brought within the very letter of the Statute. (2 Barber on Crim. Practice, p. 547; Heydon, Case 4, Co. A.)

"The following averment," says Barber, "is one of the substantial averments: '*In and upon one E. F.*'" (Page 54, Sec. — Barb. C. Prac.; see also, Form of Indictment for Murder, Sec. 541, Id.)

It will be seen that this contains an averment equivalent to charging that it was a human being. The reason why the term "human being" is not embraced in Common Law indictments for murder is because the Common Law definition of murder does not contain the term "*human being*." (1 Archbold, 831.)

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The difference between the Common Law definition and the statute definition is this: at Common Law the term "*a reasonable being alive*" is used, instead of the term "*human being*" which is in our statutes; hence the Common Law indictments mention the term "did live." (2 Bishop Cr. Prac. 543.)

As counsel, we feel safe in saying that no precedent at law or in practice can be found to justify omitting in an indictment for murder the averment that it was "*willfully and maliciously done*." (*State v. Fouts*, 4 Green, [Iowa] 500; 23 U. S. Dig. 289.)

We doubt that our statute means (critically reviewed) to warrant the averment; but if it is so intended we dispute its constitutionality and binding force, for the reason that murder being an offense at Common Law, *the offense must be set out fully as at Common Law*. (1 Bishop Cr. P. Sec. 348; *People v. Enoch*, 13 Wend. 159.)

Technical terms used in a statute must always be set forth in an indictment; but setting them forth alone is not always sufficient. (1 Bishop Cr. P., Sec. 373.)

The indictment must charge *an intent to kill*. (10 Ohio [N. S.] 459 and 598; 21 U. S. Dig. 283, Sec. 14; 2 Bishop Cr. P., Sec. 280.)

VI. The Court erred in refusing the motion in arrest of judgment and for a new trial, as the indictment did not charge the crime of murder in the first degree, and did not warrant the verdict rendered in this case and the judgment pronounced thereon.

Murder in the first degree is defined by our statute to be "all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed guilty of murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree."

Now as this indictment fails to charge this defendant with having committed the crime of murder by means of poison, or lying in wait, or torture, or in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, and inasmuch as the indictment fails to charge him with any willful, deliberate, or premeditated

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killing, or that it was feloniously done, we hold that it is self-evident therefrom that it does not charge the defendant with the crime of murder in the first degree.

Section 8 of Article I, State Constitution, and Article V amendments to the Constitution of the United States, provide that no person shall be tried for a capital or other infamous crime, unless on a presentment or indictment of a Grand Jury, etc. These words were used by the framers of those instruments in their common law sense; hence the Legislature of our State has no power to provide that an indictment shall be other than what the common law says is an indictment. For definition of Indictment at common law, see 1 Bouv. L. Dic. title "Indictment;" 2 Bishop Cr. P. Secs. 562-597, inclusive; 23 U. S. Dig. 289, Secs. 6, 7, 8 and 9, citing 4 Green's [Iowa] 500; 1 Wharton Am. Cr. Law, 400; Chitty Cr. Law, 242 and 3. The words "malice aforethought" do not signify that the person killing meant to kill. (2 Bishop Cr. P. 592, 561; 2 Bishop Cr. Law, Sec. 742.) The words "malice aforethought" do not embrace the words in substance "deliberate and premeditated." (23 U. S. Dig. 289, Sec. 9; Secs. 234 and 236 Criminal Practice Act, Statutes 1861, 460 and 461.)

VII. The evidence in this case being wholly circumstantial, did not warrant the verdict. Taking all the evidence as true, and but one fact was established beyond a reasonable doubt in the case, and that fact was, that the defendant was found in possession of some of the property of the deceased.

For the sake of argument now, taking as correct, without qualification, the rule laid down by Greenleaf in his work on Evidence, Vol. III, Sec. 31, embodied by the Court in its charge to the jury in this case, (pp. 125 and 6) and tried by that rule, we propose to show the verdict was unwarranted, and the Court erred in not arresting the judgment and granting a new trial.

It must be admitted under the rule above cited, the mere possession of the goods of the deceased, uncorroborated by any other evidence tending to show the defendant's guilt, is in itself insufficient to warrant a verdict.

Now, by the light of the rule above quoted, let us examine and

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see what other facts and circumstances it was necessary for the prosecution to establish in order to warrant the verdict in this case. And then let us farther examine and see if such facts or circumstances were proven.

The rule says : In connection with possession it behooves the prosecution to add other proof " such as the previous denial of the possession by the party charged, or his refusal to give any explanation of the fact, or giving false or incredible accounts of the manner of the acquisition, or that he has attempted to dispose of it, or to destroy its marks, or that he has fled or absconded," etc.

An examination of the record will show that there is not one scintilla of testimony tending to prove either of these circumstances, except the one of his attempted disposition of the goods. He neither refused to give an explanation of his possession ; nor did he give any false or incredible account of the manner of his obtaining them ; nor did he attempt to destroy any marks upon them ; he did not flee or abscond.

Now we take it for granted that it is a correct rule that a circumstance proven to have occurred, which tends to prove the innocence of the party accused, must be allowed to weigh as strongly in his favor as it would be allowed to weigh against him if tending to prove his guilt.

In other words, if evidence tending to show that this defendant after this murder fled or attempted to flee would be evidence of his guilt, certainly the evidence of his remaining would tend to prove his innocence. And we also contend for the rule that where one circumstance is proven which tends to show guilt, and another which tends to show innocence, they should be weighed one against the other, and both be given due consideration.

In this case the circumstance of the attempted disposition of the goods by the defendant, to our minds tends rather to prove the innocence than the guilt of the defendant in this case, he having attempted to make such disposition of the goods in this community.

Indeed, the whole circumstances in this case exclusive of the possession of the property indicate insanity or innocence, rather than sanity or guilt. That this defendant should have remained in the community where he had committed such an atrocious

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crime, when there was no obstacle to his flight, and kept in his possession the only evidence of his guilt concealed only in an insecure trunk, and that kept in a room where all had access, in a public building, covered with a cloth upon which was his own name in indelible ink ; the disposing of the dress-pattern in Gold Hill, his attempted disposition of it in a house of ill-fame in the same place, where he might have reasonably anticipated it would have been recognized, that house being frequented by the consorts and companions of the deceased ; his sale of the diamonds at the leading jewelry store in the City of Virginia ; and his pledging the deceased's watch at a pawn-broker's in the same town, leaving it within a stone's throw of the identical place where the murder was committed, and leaving it unredeemed, with the knowledge that it would be placed in a public window for sale ; form a combination of circumstances that irresistibly leads the mind to the conclusion, either that John Millain was a fool or insane, or that he was the dupe of the real murderer, and that without knowledge other than that the goods were perhaps improperly obtained, to share in the fruits he was induced by the real murderer to take charge of and attempt to dispose of the same.

Such evidence is certainly far from sufficient to satisfy the unbiassed mind that John Millain was the murderer of Julia Bulette. It certainly entirely fails to exclude any other reasonable hypothesis than that of the defendant's guilt ; on the contrary, all of the circumstances proven may be true, and the defendant not only possibly but probably innocent.

VIII. We now come to a consideration of that portion of this case which furnishes us in our judgment with an undoubted right to a reversal of this judgment.

The subject to which we allude is, the charge of the Court to the jury, and its refusal to give certain instructions asked by us.

The charge is insufficient within itself as a whole—inconsistent and illogical in detail—pregnant with errors of law, and a usurpation of power in usurping the functions of the jury in instructing them in matters of fact.

We here extract several portions of the charge, and present them to this Court in proof of our assertions.

In the charge the Court uses this language: "Your verdict must be in writing, guilty of murder in the first degree as charged in the indictment, or guilty of murder in the second degree, or not guilty." (See Record, 128.)

In another portion of the charge this language occurs:

"If you believe from the evidence, that about the nineteenth day of January last, at Virginia, Storey County, that the defendant with malice aforethought, either express or implied, and with deliberation and premeditation, did unlawfully kill Julia Bulette, with intent to take her life, it will constitute murder of the first degree, and you should so find; *otherwise you will acquit.*" (See Record, 128.)

In another place the Court uses this language in its charge:

"If you believe the defendant guilty of an offense, and doubt as to the degree, you can only convict of the lowest degree of crime within the grade of the one charged, *murder in the first or second degree.*" (See Record, 124.)

Here we have an array of palpable errors of law, for in direct terms the jury are instructed in one place that manslaughter is not a crime in the grade of murder, and not included in an indictment for murder. That this is error, see *People v. Dolan*, 9 Cal. 583; 2 Bishop's Crim. Pr. 584 and 590; 10 Ohio N. S. 459; 21 U. S. Dig. 284, Sec. 40.

Under this charge the jury were precluded from finding a verdict for manslaughter, and even of murder in the second degree.

The force of this instruction was to direct the jury to send the defendant to the gallows, or the street; all other alternative was denied the jury if they obeyed the charge.

The defendant left to the terrible stake of death or liberty, with no hope of the latter.

Degree is a question of fact. (*People v. Belencia*, 21 Cal. 544.)

The Court also erred in giving the following instruction unexplained:

"In the first place, if the fact of possession stands alone, wholly unconnected with any other circumstances, its value or persuasive power is very slight; for the real criminal may have artfully placed

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the articles in the possession or on the premises of an innocent person, the better to conceal his own guilt.

“It will be necessary for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of a thing available to a conviction; such as the previous denial of the possession by the party charged, *or his refusal to give any explanation of the fact, etc.*” (See Record, 126.)

This language unexplained led the jury to conclude that the defendant's failure *to testify and explain* these things when the law held out to him an opportunity to do so, accompanied by proof of the possession, would warrant them in finding a verdict of guilty. Thus unexplained it fairly overcame that portion of the charge where they were instructed that the failure of the defendant to testify should not be considered by the jury as an evidence of guilt. This made the charge self-contradictory, and it is fairly inferable the jury were misled by it, and under it were induced to find the defendant guilty from his failing to testify. However correct such doctrine may be at common law, it is clearly inapplicable under our statute, and that it did the defendant in this case gross injustice there can be no doubt.

In another place in the charge the Court uses this language:

“It devolved upon him to explain and account for such possession by him, etc.”

Now we ask, what other construction would the jury give to this language than that the Court meant to instruct them that it devolved on the defendant *to explain on the stand, as a witness*, how he became possessed of these things.

This charge in many portions is violative of Art. VI, Sec. 12, of our State Constitution, which provides that “Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law.” (See also Stats. 1864–5, 113, Sec. 23—to same effect.)

We call attention to the following portions of the charge:

“The testimony in this case tends to show the property of the deceased, or some portion of the same, in the possession of the defendant, at a time subsequent to the alleged murder, and at a quite recent date,” etc. (125.)

Also in another portion of the charge, this language occurs :

"The distinction between murder of the first or second degree is quite nice. I will briefly state such distinction, although from the testimony I apprehend you may conclude that the defendant was either guilty of murder of the first degree, or innocent." (123.)

Now we submit, that we here find the Court in its charge informing the jury what is proven, and instructing them relative to the degree of crime of which they should find the defendant guilty under the indictment ; for it is an axiom of the law that it will not permit that to be done indirectly which it forbids to be done directly. (*People v. Ybarra*, 17 Cal. 170, 171 ; *People v. Gibson*, Id. 284, 285 ; 20 U. S. Dig. 481, Secs. 126, 134 ; 21 Id. 284, Sec. 40.)

The following portion of the charge is erroneous :

"Murder of the first degree consists of a willful, premeditated, unlawful killing. The intent to kill must exist. This intent may be inferred from the circumstances."

The error herein consists in giving a wrong definition to the course of murder in the first degree, and in the use of the term "inferred." (Sec. 21 Cal. 546.)

Another error in the charge is, in the use of the following language :

"This intent need not have existed for any given length of time before the killing. It is sufficient, the killing being unjustified or unexcused by the circumstances, if it be formed at the instant of killing." (4 Green, Iowa, 500 ; 23 U. S. Dig. 290, Sec. 23 ; 1 Park Crim. 347 ; U. S. Crim. Dig. 326, Sec. 580.)

Also the following portion of the charge was erroneous :

"By reasonable doubt is ordinarily meant such a one as would govern or control you in your business transactions or the usual pursuits of life." (*Jane v. Commonwealth*, 2 Met. 30 ; 20 U. S. Dig. 482, Sec. 142.)

The Court also erred in refusing to give the instructions asked for by the defendant in relation to the weight to be given to the proof of his having in his possession the goods of the murdered woman.

The instructions clearly state the law, and there is no justification in the reply that the same law was substantially stated in the charge. (*People v. Ramirez*, 13 Cal. 172.)

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In conclusion, we have simply to state that, although it may be true that the defendant in this case is a murderer, is it likewise true that he has been legally convicted? And we present his case to this Court, reddened as he may be by blood, with a firm conviction that this Court will yield to no popular clamor, but will intelligently and justly administer the law in this case as in all others, which being done, we feel confident the Court must award a new trial.

Pitzer, for Respondent, filed the following brief:

The first objection to the record is the challenge to the grand juror D. Black, for bias against the defendant.

The objection is not well taken. (See Statute 1866, page 49, Section 180.)

As to the challenge to the panel: it does not specify the grounds of the challenge, neither was it in writing. (See Statute 1861, page 468, Section 324.)

The demurrer was properly overruled by the Court below. The indictment strictly conforms to Statute 1861, pages 459 and 460, Sections 234 and 235, as amended by Section 6, page 126, Statutes 1867.

The objection as to the killing of a human being is refuted by charging the defendant with murder. For definition of "Murder," see Statute 1861, page 68, Section 15.

The third point of error relied on is the overruling of the motion for a change of venue. The error is not well assigned; it being a discretionary power of the Court will not be reviewed upon appeal, except for gross abuse, which does not appear to be the case in this instance.

The fourth error assigned is not well taken: First, because the objection was oral. (See Statutes 1861, p. 468, Sec. 324.) Secondly, the objection does not point out the error relied on.

The fifth error assigned—challenge for implied bias—is not well taken: First, the objection to D. Black, B. Potter, J. Monahan, L. E. Morgan, L. Alexander and L. D. Young, is upon the ground that they had formed or expressed an opinion or belief touching the guilt or innocence of the defendant. The evidence of said jurors,

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as appears of the record, shows that they had not formed an unqualified opinion or belief that the defendant was guilty or not guilty, and therefore the challenges for implied bias were properly overruled. (See Statutes 1861, p. 470, subd. 8 of Sec. 340; also *The People v. Reynolds*, 16 Cal. 128; *People v. Vermilyea*, 7 Cowen, 121 and notes.)

The sixth error assigned is not well taken. The instructions of the Court conform to law, and do not instruct as to facts.

The first and third instructions asked by defendant's counsel are embodied in the instructions given by the Court.

The second and fourth instructions offered by defendant's counsel were properly refused by the Court, not being law.

The Attorney General also argued the case orally for the Respondent.

Opinion by BEATTY, C. J.

This is a case of conviction for murder in the first degree. The several grounds of error which the appellant assigns we will notice *seriatim*.

The first point made is, that the Court below erred in failing to sustain his challenge to a grand juror named D. Black. Black, on an examination touching his qualification as a grand juror to act in this case, said substantially that he had heard of the charge against the prisoner, and had formed an opinion touching his guilt or innocence; that perhaps he might be called as a witness in the case to identify a certain piece of property as having belonged to deceased; that he was not a prosecutor in the case. The defense objected to the grand juror participating in the examination of the charge against him, for two reasons: First, because he was a witness for the prosecution; and second, because he had already formed an opinion as to his guilt or innocence; and upon the ruling of the Court that Black was a competent juror to investigate the charge and join in finding an indictment, excepted.

In argument it is contended that defendant was just as much entitled to an impartial grand jury in making the preliminary examination on which the indictment was found, as to an impartial jury

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to try the charge after it was made. In support of this proposition we are referred to several authorities. The opinion of Chief Justice Marshall in the Burr trial is perhaps the authority entitled to most weight on this point. We have no copy of Burr's trial in this place, and there is none in the State that we are aware of. We cannot, therefore, have the means of ascertaining the grounds on which that great jurist based his opinion. But as the Congress of the United States have never, so far as we are aware, passed any law touching the qualification of grand jurors, we presume the opinion or ruling in that case must have been based either upon common law principles or upon the ground of natural justice. This latter ground was probably the one on which the Chief Justice acted. In the case of *The People v. Jewett*, 3 Wendell, 313, the New York Court seems to have followed the rule laid down by Marshall; or to speak more accurately, say they would have followed the rule if the objection to the grand juror had been interposed at the proper time. These are the only cases we find supporting such an objection to a grand juror, except in those cases where there is some statute authorizing a party accused to interpose a challenge to grand jurors on account of bias.

When the ruling of Chief Justice Marshall in the Burr trial was called to the attention of the Supreme Court of Massachusetts, that Court not only refused to be governed by it, but expressed their strong disapproval of the case, and thought it the only case of the kind to be found in the books. They refused to remove a prosecutor from the panel of a grand jury before whom a capital case was to be investigated. (See Tucker's case, 8 Mass. 285-6.)

We think at common law a grand juror might be the prosecutor, the only witness in the case, and still participate in finding the bill. (See Wharton's Criminal Law, Sections 453 to 458, and notes.) But whatever may have been the rule at common law, or whatever the principle of natural justice, our statute fixes the disqualifications, and the only disqualifications, of grand jurors. The Statutes of 1866, p. 49, amending a former Act, provide that "a challenge to an individual grand juror may be interposed for one or more of the following reasons, and for no other: First, that he is a minor; second, that he is an alien; third, that he is insane; fourth, that he is the prosecutor upon a charge or charges against the defendant."

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It is not pretended that this grand juror is shown to have labored under any of the disqualifications here mentioned, except as to that of being a prosecutor. We cannot conceive that there is anything in the record tending to show that he was a prosecutor. Bouvier defines a private prosecutor to be "one who prefers an accusation against a party whom he suspects to be guilty." This is a very correct definition, and certainly is not broad enough to include a mere witness in the case, who is not shown to have taken any part in setting a prosecution on foot. A party who voluntarily makes an affidavit to procure the issuance of a warrant to arrest a party whom he accuses of crime is properly a prosecutor. So too a party who voluntarily procures permission to be sworn and go before a grand jury to testify as to any alleged crime, may be held to be a prosecutor. But a party who merely appears in response to a subpoena issued at the instance of the grand jury or the prosecuting attorney, cannot be held or treated as a prosecutor. He is merely a witness, and nothing more. We see no valid objection to the grand juror.

The second assignment of error is in this language :

"The Court erred in not sustaining the defendant's challenge to the panel of trial jurors, as the names were not put in the box and drawn in open Court, as required by law." And the part of the statement in support of this error is as follows: "The Clerk of said Court, in drawing the names of said seventy-five jurors from said jury box—pursuant to the order therefor—drew the said seventy-five names from the jury box in the Clerk's office, in the presence of the Judge of the Court."

Whilst this statement shows that their names were drawn from the jury box in the Clerk's office, it does not show that they were not drawn in open Court. The Court may have been in session in the Clerk's office. The Clerk's office and court-room may have been one and the same, or being in the same building, they may by the opening of a door or the throwing open of a partition, have been all thrown into one room. There is not sufficient in the record to show what were the real circumstances of the case. If the drawing took place whilst the Court was in session, and in the presence of its officers, consisting of Clerk, Sheriff, attorneys of the Court, etc., it must be held to have been done in open Court, whether in the

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room where the Court ordinarily transacts its business or any other room in the same building. The record does not affirmatively show error.

The third ground of error is the refusal of the Court below to sustain the appellant's challenge to several jurors for implied bias. Perhaps the strongest case made by appellant on this assignment is the one shown by the examination of D. Black. We will give the most material portions of his examination :

Question. This spring or summer did you read of the apprehension of Millain? *Answer.* I read of the apprehension and imprisonment; the name I could not tell. I think I heard of it, too.

Q. Did you read the newspaper accounts about the finding the property of the deceased—the silk dresses, the furs, the jewelry, etc., found at the bakery in his trunks? *A.* I could not say positively whether I heard it or read it. I either heard of it or read of it.

Q. Have you conversed with any person about this man? *A.* No; I have heard others when I was passing by.

Q. You have heard others express opinions as to whether he was guilty or not? *A.* I have heard many.

Q. Have you heard persons express opinions about it in whose judgment you place confidence? *A.* I place confidence in no man's judgment.

Q. No confidence in any man's judgment? *A.* No one.

Q. You place confidence in your own? *A.* Sometimes.

Q. Did you read an account published in the newspapers about this man's admitting to the Chief of Police he was guilty? *A.* I rather think I have been told that part of it. I might have read it.

Q. Did you believe it when you read it? *A.* I could not say I believed it.

Q. Did you believe it this far: would you believe it from now on if you should hear it disputed—would your belief tend rather to its truth than its falsity? *A.* Yes, that much it would.

Q. I ask you if, from reading an account that the defendant had confessed his guilt—if from reading that he had been found with the goods in his possession, and that he had confessed he was guilty—any feeling of bias or prejudice against him was engendered in your mind? *A.* No prejudice in my mind.

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Q. Does he occupy the same place in your opinion as any other man in the community? *A.* Well, I would rather keep him at a little distance.

Q. Why would you rather keep him at a distance? *A.* Well, it is more or less prejudice.

Q. Have you a feeling of bias or prejudice against this defendant arising from evidence that you believe? *A.* I have never formed or expressed an opinion as to his guilt or innocence.

Q. Have you an impression he is not guilty? *A.* Whatever impression I have is against him.

Q. You have an impression against him? *A.* To a certain extent.

Q. Would it require evidence to remove that impression? *A.* It certainly would.

Q. So that impression is a belief? *A.* Yes.

Q. It would require evidence to remove it? *A.* Yes, sir.

Mr. DeLong challenges the juror for implied bias.

Mr. Pitzer—If you are asked the question if you believe or have an opinion in your mind whether this defendant is guilty or innocent, could you say Yes or No? *A.* I would not say either—either that he was or was not.

Q. Your mind is in such a state that you cannot believe he is either guilty or innocent? *A.* Exactly.

Q. How often have you seen the defendant? *A.* I never saw him before I saw him in Court. I have heard more in Court to-day than I have heard before.

Q. Did that create a bias or prejudice against him? *A.* It certainly made more or less.

Q. Did you have any feeling or prejudice against him before that? *A.* Not before I came into Court; not a particle before I came into Court.

Q. Do you feel that, laying everything else aside, you could give this defendant a fair and impartial trial upon the evidence alone? *A.* I would just pass upon it the same as I would anything else, if I did not know anything about the case.

Q. You say you have no opinion as to whether this defendant killed the woman or not? *A.* I have not.

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Q Upon that subject you have no opinion? *A.* No, none.

Prosecution denies the challenge.

By the Court.—Does that opinion you have relate to the question of the guilt or innocence of the defendant? *A.* Well, what I have heard in Court to-day would be a belief.

Q. Merely what you have heard in Court to-day—does it arise from that? *A.* That is all; about the goods being seen in his possession, that brought me to my belief.

Q. Have you any prejudice against the defendant by reason of this indictment? *A.* Not a particle.

Q. Do you entertain an opinion as to the guilt or innocence of the defendant that would require evidence to remove, from what you have heard to-day? *A.* Well, it would take some, no doubt.

Q. Could you give this man a fair and impartial trial, setting aside all you have heard to-day, and try him according to the law and evidence? *A.* Certainly I could, according to the law and evidence.

By the Court.—I think he is a competent juror.

The only ground of implied bias claimed by the appellant to have been shown in this case is one which comes under the eighth division or class of causes which the statute says shall be evidence of implied bias. This eighth division reads as follows: "Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged."

These answers are somewhat contradictory, but in our opinion do not show any disposition to conceal the opinions or views of the juror. They rather show that the juror was sometimes rather inaccurate in the use of the English language. They further show that from what the witness had heard before he came into Court he had formed an impression that the prisoner was probably guilty, and that impression was somewhat strengthened by what he had heard the prisoner's counsel say in the course of his examination about prisoner having been found in possession of goods of deceased. And before that suspicion or impression could be removed he would have to hear some exculpatory evidence from the other side. If a mere suspicion of this sort were sufficient to exclude a juror, we do not see how any juror of common intelli-

gence could serve in any given case when the defendant wished to exclude him. A juror being called up and informed that a party in Court has been indicted and stands charged with a certain offense, (if he has heard nothing of the case before) naturally has his suspicions aroused that the party may be guilty, else he would not likely have been indicted. If in addition to this the prisoner's counsel asks if he has not heard or read of certain suspicious circumstances connected with his client's conduct, this suspicion, however slight at first, is thereby naturally increased. Indeed, we can scarcely conceive of a case where an impartial juror could be sworn to try one charged with a grave offense without some suspicion resting in his mind that the prisoner was guilty.

A mere suspicion is not enough to disqualify a juror; it must be a fixed and positive opinion: in the words of the statute "an unqualified opinion or belief." What it takes to constitute "an unqualified opinion or belief," it is sometimes very difficult to determine. Perhaps as good an exposition of the technical meaning of this phrase is to be found in the opinion of Mr. Justice Baldwin in the case of the *People v. Reynolds*, 16 Cal. 132, as could well be given. From that opinion we quote one paragraph which expresses our views more clearly than we ourselves could express them: "Among the causes of implied bias, is the having formed or expressed an unqualified opinion or belief that the prisoner is guilty, or is not guilty of the offense charged. (Wood's Dig. 296, Sec. 347.) Upon no one question of civil or criminal practice have the decisions of Courts been more inharmonious than upon this question of qualification or disqualification of jurors, arising from the formation or expression of opinion of the guilt or innocence of the accused. We are relieved to some extent of the task of determining the question upon its original merits, for our statute was designed to fix a rule upon this subject. It makes the formation or expression of an unqualified opinion or belief a ground of exception to the juror for implied bias. The only difficulty is to fix the meaning of these terms, 'unqualified opinion or belief.' Evidently these terms were used to define the nature of the opinion or belief formed or expressed; to distinguish between a mere hypothetical opinion, or a mere casual impression, and a decided or fixed opinion.

The language implies that, to exclude the juror, he must have a settled conviction of the guilt or innocence of the party, or has expressed such a conviction. It does not seem to be indispensable, under this section, that the juror has had the usual, or any means, or opportunities, of arriving at a correct or intelligent opinion upon the subject, if he has formed it or if he has expressed it. Minds are so differently constituted that some men form opinions and very obstinately adhere to them upon slender and insufficient grounds, while others are undecided when sufficient reasons exist for forming them. The statute fixes a standard of its own by which impartiality is approximated as nearly as possible consistently with the effective administration of criminal law. It has declared a test of exclusion for implied bias to be, that the juror has formed or expressed 'an unqualified opinion.' We must hold this rule in its simplicity, neither subtracting from it nor adding anything to its requirements. If, for example, the juror has read or heard a statement of the facts of a case, this does not of itself, under the section, disqualify him, for it does not follow that he has either formed or expressed 'an unqualified opinion.' He may not have formed any opinion at all, certainly not an unqualified one. He may have received an impression, but this impression is not enough to disqualify him. A mere suspicion or inclination of the mind toward a conclusion is not enough; the state of the mind must be more decided. He must have reached a conclusion like that upon which he would be willing to act in ordinary matters. In other words, we repeat, the effect upon his mind must be more than an impression; it must amount to a conviction in order to exclude him for implied bias."

But even with this explanation, as clear and precise as the nature of the subject will admit of, we cannot but admit that many causes might arise where the shades of opinion would be so nice as to render it impossible to arrive at a satisfactory conclusion as to whether the opinion formed by a juror was "an unqualified opinion." Suffice it to say we do not think this juror, or any of the other jurors challenged for implied bias and permitted by the Court to sit in the case notwithstanding the challenges, had formed "an unqualified opinion or belief."

The fourth assignment of error is, that the Court below erred in refusing to grant a change of venue. This motion was founded on three affidavits, and the admission of the District Attorney of certain facts. The substance of these affidavits was as follows: Defendant's affidavit showed that deceased lived in Storey County and had many friends who are now zealous to convict defendant. Some of them have stated defendant should die; that they would hang him if he was not convicted. They have been active in procuring evidence and prejudicing the public mind by spreading false reports as to defendant's admissions and as to other crimes alleged to have been committed by him; that the daily press has prejudiced the public mind by false reports of confessions and slanderous charges of complicity on the part of this defendant in other crimes. These things have, as deponent is informed, produced a feeling of hatred, ill will and vengeance against the defendant, rendering it impossible for him to obtain a fair trial in Storey County.

C. E. DeLong shows that the circumstances of the offense, its enormity, etc., have created great excitement. That he has had good opportunity to observe the public feeling, and he thinks, from the false reports of the newspapers as to the confessions made by defendant, and from the excitement produced by the enormity of the offense, the public have generally settled down into a conviction of defendant's guilt, not only of this, but of other heinous crimes, and thinks he could not have a fair trial in Storey County.

A. Genesy, after showing his means of knowledge, which are considerable, states that he has heard an almost universal expression of opinion in the community of Storey County that defendant was guilty, and thinks he cannot have a fair trial in that county.

Besides these affidavits, the District Attorney admitted the following facts, to be acted upon by the Court as if proved by proper affidavit: "That the Gold Hill 'News,' the Virginia 'Daily Trespass,' and the 'Daily Territorial Enterprise,' were three newspapers, printed and published daily in Storey County, Nevada, and of general and universal circulation in said county; that in each of said papers had been heretofore printed and published full and particular details of the murder of Julia Bulette; also of the arrest of defendant, charged with the commission of said murder; also

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full reports of the finding of the goods of deceased in the possession of this defendant, and the recognition of defendant, when in custody, by several citizens, as being the person who had at various times offered to sell to said persons articles of clothing and jewelry recognized as being property of deceased. Also, in said papers, the statements had been printed and published that the defendant, after his arrest, and when confronted with the goods of deceased, had voluntarily admitted to one Edwards, Chief of Police, that he was guilty of said crime of murder. Also a statement of the evidence adduced on the examination of defendant had been by said papers published and circulated generally throughout the county of Storey, and read by the citizens thereof."

The Court, on this showing, overruled the motion of defendant, for the time being, but made the following remarks:

"When overruling said motion the Court informed counsel, that having a large number of jurors in attendance, he would first attempt to empanel a jury; and if from examination of jurors he found that such a bias existed against defendant as to render it quite difficult to obtain a jury, that he would then allow counsel to renew his motion and then would grant it."

The Court finally proceeded to trial without a change of venue, and we are to presume that it was satisfied, from an examination of the jurors in attendance, that a fair and impartial trial could be had in Storey County.

There are few cases that present themselves to Appellate Courts where it is more difficult to determine upon any settled principles or rule of action, than in these cases relating to a change of venue. By all it is admitted that there is a broad discretionary power allowed the Court of original jurisdiction. But whilst that Court has such discretion, it is still a judicial and not an arbitrary discretion. If that discretion is used in an arbitrary and oppressive manner, an Appellate Court is bound to correct the error. But to distinguish between what is and what is not an abuse of that discretion, is often a very nice and difficult question. There are two circumstances, the existence of either of which should entitle the defendant to a change of venue.

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The one is the impossibility of obtaining an impartial jury. The other is such a state of public excitement against the defendant, that even an impartial jury would be likely to be intimidated and overawed by public demonstrations against the accused. There is little in affidavits, or admissions of District Attorney, tending to show such a state of feeling in the public mind as was calculated to intimidate the jury. It is true, some friends of the deceased had made threats of violence against the prisoner, but there is nothing to show such friends were either sufficient in number or influence to seriously affect the great body of the people. Indeed, if we can allow that the Judge below was acquainted with the fact, and authorized to act on the knowledge of a fact made sufficiently apparent by the record, that the murdered woman was a cyprian, it should justly have tended greatly to convince him that her friends were not of a class to exercise any great power in forming public sentiment. If there was any great excitement, it must have arisen from the atrocity of the crime rather than any influence exercised by friends of the deceased.

The showing of the defendant established satisfactorily that the circumstances of the murder were widely discussed; that a great deal of testimony and many reports about other supposed circumstances, tending to criminate defendant, were printed, published, and generally read throughout Storey County. This tended to show that it might be difficult to obtain a fair and impartial jury in that county. But it did not show conclusively that it would be so. We think the Court below took the prudent plan of ascertaining that fact. That is, by examining the jurors who were in attendance on the Court. The Court seems to have hesitated, on the production of the affidavits, etc., and to have acted prudently and with due regard to defendant's rights. The motion for change of venue was only finally refused after the Judge had satisfied himself by examination that an impartial jury could be obtained. We cannot say that he abused his discretion or acted unwisely in coming to this conclusion. If we examine the authorities on this subject, we find little that is satisfactory or conclusive. So far as we have examined them, some cases seem to sustain the views above expressed, and none of them are clearly in opposition thereto. In

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the case of the *State of California v. W. B. Lee*, 5 Cal. 353, the Court reversed a judgment against the defendant because the Court below had refused him a change of venue upon a motion sustained only by his own affidavit, expressing the defendant's opinion that he could not have a fair and impartial trial, and showing that over one hundred citizens of the county had united in employing counsel to prosecute.

On the other hand, in the case of the *People of the State of California v. John Mahoney*, 18 Cal. 180, the prisoner showed by his affidavit (uncontradicted) that a few years before that time he had been arrested by an armed body of citizens unlawfully organized into what was called a Vigilance Committee, and placed on board a vessel to be transported beyond the State of California; that on making his escape and returning to San Francisco he was again arrested, and after being kept in confinement for some time, he had a sentence read to him by one of the members of that committee (in effect) of perpetual banishment from the State of California, and threatening him with death if he ever returned. Under this sentence he was sent on board of a vessel in irons and thus transported beyond the limits of the United States. He showed this organization, thus dealing out punishment in violation of law, consisted of about six thousand citizens of San Francisco county; that among the number of that organization was the Judge then presiding in the Court where he was tried. He showed that besides these six thousand enrolled Vigilance Committee men (most of whom were qualified to act as jurors) many other persons sympathized with and encouraged the organization. He pointed out the great prejudice which was excited against himself because of this proceeding against him by the Vigilance Committee. Yet the Court below refused him a change of venue, and the Appellate Court refused to interfere with the judgment, holding in effect that they saw no abuse of discretion in the Court below.

In the case of *The People v. Webb*, 1 Hill, New York, the Court before which the trial was pending in an indictment for libel, changed the venue upon a showing that the defendant had taken great pains to prejudice the mind of the public against the prosecutor; that inflammatory articles had been sent by defendant,

or through his influence or procurement, not only to others but to three-fourths of the jurors actually summoned to the term of the Court at which the case was expected to be tried. The Court here seemed to have been influenced by the feeling that defendant's conduct in thus attempting to tamper with the prejudices and feelings of jurors was wholly unjustifiable, and therefore yielded the more readily to the solicitations of the prosecutor for a change of venue. Perhaps, had these publications been sent to jurors by others not connected with or influenced by defendant, they might not so readily have assented. Here too the change of venue was granted before trial. It by no means follows that if it had been refused and the trial had resulted adversely to the party asking for the change, the Court would, on review of such case, have reversed the judgment. We have examined many other cases, but none of them, we believe, are more favorable to the views of appellant than two of those we have noticed, neither of which seems to be at war with the views we have expressed.

The next point made by appellant is, that the Court erred in refusing to sustain the demurrer to the indictment.

The body of the indictment (excluding title of Court, caption, etc.) is in the following form: "John Millain, above named, is accused by the grand jury of the County of Storey, by this indictment, of the crime of murder, committed as follows, to wit: 'That said John Millain, of Storey County, State of Nevada, on the twentieth day of January, A.D. 1867, or thereabouts, at Virginia City, Storey County, State of Nevada, without authority of law and with malice aforethought, killed Julia Bulette by striking her on the head with a stick of wood, and by choking and strangling the said Julia Bulette with the hands of him, the said John Millain; whereof and by means of the blows, choking and strangling aforesaid, the said Julia Bulette then and there died.'

"All of which is contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nevada."

This, as a common law indictment, is obviously defective in several particulars. It fails to charge that the alleged killing was felonious. It fails to charge that the defendant did murder Julia

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Bulette. It fails to charge the felonious, willful, and malicious assault which usually precedes the charge of killing and murdering in a common law indictment.

Indeed its defects as a common law indictment are so numerous, it may be said to contain scarcely anything that a common law indictment should contain. But there was no attempt to make this a common law indictment. It was simply an attempt to follow a form prescribed by the statute. There are, indeed, but two questions for us to consider in connection with this indictment. First, does it conform substantially to our statutory form; and second, had the Legislature power to dispense with the formality of the common law indictment? Our Criminal Practice Act, as at present amended, contains the following sections:

“Section 235. It [meaning indictment] may be substantially in the following form:

“State of Nevada, County of ———. The State of Nevada, plaintiff, against A B, defendant, [or John Doe, whose real name is unknown, defendant]. A B above named is accused by the grand jury of the County of ——— of a felony, [or if of the crime of murder, etc.] committed as follows:

“The said A B, on the ——— day of ———, A.D. 18—, or thereabouts, without authority of law, and with malice aforethought, killed Richard Roe by shooting him with a pistol (or with a gun or other weapon, according to the facts).”

“Section 236. The indictment must be direct, and contain as it regards: first, the party charged; second, the offense charged; third, the particular facts of the offense charged—so far as necessary to constitute a complete offense—but the evidence tending to prove the charge need not be stated. It shall not be necessary to set forth in the indictment the character of the weapon used, nor that any weapon was used in the commission of the offense, unless the using of such weapon is a necessary ingredient in the commission of the offense.”

“Section 244. No indictment shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant.”

This indictment certainly contains all that the statutory form requires, and indeed more than that form requires. The form omits (this was undoubtedly an oversight of the draftsman) to show the place of killing. This indictment contains it. The form ends with describing the means used to produce death. This form charges that death was the result of the use of this means. Then in two respects it is a much better indictment than the statutory form requires. The section following that in which the form is given, requires the indictment to show by positive averment the following things: First, who is the party charged? Here John Millain is the party charged in direct and positive language. Second, the offense with which the party is charged. Here the offense is distinctly charged to be murder. Now as murder is an offense clearly defined in the statute, it cannot be questioned that the offense is clearly charged. The only other requirement of this section is: that "the particular facts of the offense charged, so far as necessary to constitute a complete offense," be contained in the indictment. This latter clause might admit of interpretations widely variant. A stickler for old common law forms might well say: "The particular facts of the offense charged could only be shown by stating them with all the particularity required in a common law indictment." One more imbued with the spirit of modern innovation might well say that an indictment in this form was sufficient to comply with this requirement:

"UNITED STATES OF AMERICA, }
State of Nevada, County of Storey. } INDICTMENT.

In the District Court of the First Judicial District.

At a term begun and holden at the Court House in Storey County, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-seven, and continuing in session at the time of finding this indictment. Present—Hon. RICHARD RISING, presiding Judge. *The State of Nevada*, Plaintiff, v. *John Millain*, defendant.

"Defendant, John Millain above named, is accused by the grand jury of Storey County of the crime of murder, committed as follows:

"The said John Millain, on the twentieth day of January, 1867,

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murdered Julia Bulette of the City of Virginia, in Storey County, in the State of Nevada, by striking her with a stick and choking her with his hands."

If the language above used means anything, it means: first, that John Millain is a reasonable human being, for only such reasonable human beings can commit murder; second, that Julia Bulette was a human being, for human beings only can be murdered under all definitions of that word; third, Millain must (the indictment being true) have killed Bulette—there can be no murder without killing; fourth, the killing must have been unlawful; for lawful killing is not murder; fifth, it must have been felonious, for no killing is murder or manslaughter unless it be done feloniously; sixth, it must have been done with malice aforethought, for this is an ingredient in all murder. The time and place are also stated, and the instruments or means used to produce death.

What other facts need be alleged or proved to show the commission of the offense charged? Now, whilst we would not be considered as sanctioning such a form as we have given above, we have no hesitation in saying that, if the Legislature had prescribed such a form in Section 235, we would have been perfectly justifiable in holding that there was no discrepancy between that and Section 236. The Legislature has prescribed a form, and this indictment has followed that form in all its parts, only making two additions to the prescribed form, both of which tend to make the indictment more perfect. They certainly do not detract anything from its certainty and precision. We think this indictment complies with all the requirements of the statute.

In regard to the power of the Legislature to make such an indictment sufficient, we can see no constitutional objection. The power of State Legislatures to prescribe the method of proceedings in civil and criminal Courts, is universally conceded. The Constitution of the United States, and also of our own State, contains a clause to this effect: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." This clause of the Constitution would not prevent the Legislature from authorizing the trial of

criminals upon the mere presentation of a grand jury. A presentment at common law was a mere informal statement of a grand jury (not prepared by the law officer of the Court) calling attention to the existence of some violation of law which the jury might think needed correction. An indictment is defined to be a "written accusation of one or more persons, of a crime or misdemeanor, presented to, and preferred upon oath or affirmation by a grand jury legally convoked." Now as the Constitution only requires presentment or indictment before trial for a capital offense, it did not intend thereby to prevent the Legislature from prescribing how the grand jury should form their indictments, but simply that such a body should in some form express their approbation of the prosecution, before a party could be put on his final trial for a capital or other infamous offense.

The next point, and perhaps the most important one made by appellant, is this: that the Court below should have arrested the judgment, because the indictment was not an indictment for murder in the first degree, and therefore did not sustain the verdict of the jury. This brings up the question, whether murder in the first degree and murder in the second degree are two distinct offenses, requiring separate and distinct indictments, or whether they are both but one offense, requiring a single form of indictment? The appellant contends that they are two separate offenses. That murder in the first degree contains certain elements of crime which do not necessarily enter into the simple crime of murder, and that therefore no man can be convicted of the crime of murder in the first degree, unless those special circumstances of atrocity which raise it from the grade of ordinary murder be specially stated in the indictment. That murder in the first degree is just as distinct from ordinary murder as murder is from manslaughter. In support of this position, we are referred to the work of Bishop on Criminal Procedure, Vol. II, Section 562, *et sequitur*. The reason of Mr. Bishop in favor of the proposition that murder in the first degree and simple murder (murder in the second degree) as defined in a statute almost identical with ours, is conclusive and unanswerable. But whilst Mr. Bishop has labored with zeal and ingenuity to show the distinct nature of the two offenses—whilst he has not hesitated to cen-

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sure Legislatures for sanctioning the practice of allowing criminals to be convicted of an offense for which they were not technically indicted—whilst he has censured Courts for so construing statutes as to allow such a practice, when the language of the statute might fairly (in his opinion) admit of another and more reasonable construction, he has not hesitated to admit that where the statute of a State provides for but one form of indictment for both grades of murder, the Courts have nothing to do but to act on the law as they find it, unless indeed the Constitution of the State shall be opposed to the law. He seems further, rather reluctantly, to admit that under statutes in the same form substantially as ours, the various State Courts where such a statute exist have almost uniformly held that the ordinary form of indictment for simple murder was sufficient to support a conviction for murder in the first degree. We copy from Mr. Bishop's work three sections, which clearly show his views as to what has been held under a statute like ours. In a note to Section 565, he refers to numerous decisions sustaining the sufficiency of the ordinary form of indictment for murder to sustain a verdict for murder in the first degree :

“SEC. 562. In the work on criminal law, the statutes relating to this subject, with their interpretations, will, as far as their presentation is necessary, appear—except as to the provisions which concern the procedure. Let us here, however, repeat the parent statute, being the Pennsylvania one of 1791. It is, with the exception of the part which relates to the procedure, as follows : ‘Whereas, the several offenses which are included under the general denomination of murder differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment, etc. ; all murders which shall be perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate or premeditated killing ; or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree ; and all other kinds of murder shall be deemed murder in the second degree.’”

“SEC. 563. Here is a statute dividing murder into two degrees, precisely as felonious homicide was by Stat. 23, Hen. VIII, Chap.

1, Sec. 3, divided into the two degrees which were afterward termed murder and manslaughter. And if any one wishes to see how the procedure should be, particularly as concerns the form of the indictment, if the statute ended here, he has only to reperuse the discussions under our last sub-title for a complete judicial exposition of the matter. But the statute did not so end. It continued, in the same section, to provide as follows: 'And the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the Court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.'

SEC. 565. "It is never well for legislation to make exceptional provisions respecting the procedure in particular cases. Still, as legislators will sometimes do such things, the Courts must deal with them as best they can. And the course of decision in our tribunals has been that, if the indictment is drawn after any form which would be good at the common law as an indictment for a common law murder, the jury may, by force of the above statutory provisions regulating the procedure, take into their consideration evidence of those facts not alleged, which, added to the facts alleged, constitute murder in the first degree, as distinguished from murder in the second degree. In other words, the indictment need not set out the aggravating circumstances which swell the crime to murder in the first degree, as the indictment for the first degree of felonious homicide called murder is required to do with respect to those which thus swell the offense from the second degree, called manslaughter, to murder. This comes, as just said, from those statutory provisions which regulate the procedure."

Whilst our statute distinguishing between murder of the first and second degree does not contain the preamble as quoted by Mr. Bishop from the Pennsylvania statute, in other respects it is almost an exact copy from the Pennsylvania Act. There are one or two slight verbal discrepancies, but there is nothing which would call for a different rule of action in regard to indictments under the two Acts.

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We are satisfied from the language of the statute that it was not the intention of the Legislature, in making the distinction in the two classes of murder, to require a distinct indictment for each; and as it had been almost the uniform practice under similar Acts in other States to hold that an ordinary indictment for murder was sufficient to sustain an indictment for the higher crime of murder in the first degree, we must hold that the Legislature, in adopting the statute, also adopted the interpretation heretofore put on it.

Holding, then, that the indictment in this case is a good indictment for murder under the form prescribed by the Legislature, and that any indictment which is sufficient as a simple indictment for murder is sufficient to sustain a verdict for the higher crime of murder in the first degree, the only remaining inquiry to be made is: has the Legislature the power to require a jury, under an indictment for murder, to determine whether the prisoner has been guilty of murder only, or of the higher crime of murder in the first degree.

If we were called upon to determine whether it would be proper for the Legislature to exercise such a power, probably, as lawyers accustomed to all the formalities of the common law, we might answer in the negative. But propriety is one thing—power is another. The Legislature has absolute power over the subject of criminal practice, in most respects. It cannot deprive a party of the right to trial by jury, of the right of appeal, the right to be defended by counsel, the right of compulsory process for his witnesses, and perhaps some other rights which are especially provided for either in the State or United States Constitution. He cannot even be put on trial for an offense punishable with death, or for other infamous crime, without an indictment or presentment by a grand jury. But the form of that indictment or presentment, according to our views, is entirely within the control of the legislative department. Our Statute (Sec. 412 of the Criminal Practice Act) declares: "In all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense charged."

So the Legislature might, in our opinion, declare that when a

person is indicted for manslaughter only, he may be found guilty by the jury of either manslaughter, murder in the second degree, murder in the first degree, or be acquitted, as all the facts proved, taken in connection with the law of the land, shall appear just and proper. Indeed, if no distinction is to be made between murder in the first degree, which is punishable with death, and murder in the second degree, which is only punishable with imprisonment, it would seem but reasonable that all distinction as to the form of indictment between simple murder and manslaughter should be abolished, for each of these crimes is punishable by imprisonment only, and they both may be for the same term, to wit: ten years—the only difference being that ten years is the shortest period in murder and the longest in manslaughter. If indictments in these cases are to be governed by any philosophical rule, they should clearly designate the grade of the offense with which the prisoner is charged, clearly distinguishing the offense charged from the next lower grade; or else there should be but one form of indictment for all unlawful homicide, leaving the jury to determine, from facts proved on trial, the grade of the offense. It is, however, our business to administer the law as we find it, and not make law.

The argument of Mr. Bishop against the power of the Legislature to dispense with the finding of an indictment for murder in the first degree, specifically pointing out those circumstances of deliberation or atrocity which raise it from the degree of simple murder to the higher crime, are principally based upon the following clause of the Constitution of Massachusetts: "No person shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally described to him."

It is sufficient to say, in answer to his arguments, so far as they are sought by appellant to be applied to this case, that we have nothing in our Constitution at all similar to this.

Appellant contends that there is not sufficient evidence to sustain the verdict; that the whole amount of proof is that defendant was found in possession of some of the property of deceased. We view the proof in a different light. He was found in the possession of a large amount of the property of the deceased, and of that property which she had only a few hours before her death; not only in pos-

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session of an amount of her property, which he could not well have obtained honestly, but he is shown to have made false statements in regard to it.

At least, if the statements were true, he could easily have proved some of them to be so, which he neither did, nor attempted to do. He made statements in regard to the dresses and jewelry having belonged to his wife, who he said was dead. Yet on the trial he made no attempt to show he ever had a wife, nor any attempt to find the woman who had (according to his story) sent a dress pattern by him for sale. When he sold the diamonds, instead of selling them in their settings, he took them out of the gold setting and sold them separately. This was not the conduct of an innocent man.

The possession of property recently stolen, or taken from the owner by the perpetration of other felony, such as burglary or robbery, etc., is at least some evidence against the person having possession of the same that he is the felon. If the property is such in character or quantity as would not be likely to come honestly into the hands of the person with whom it may be found, as ladies' dresses, jewelry, etc., in the hands of a single man not engaged in trade or pawnbrokerage business, this would greatly strengthen the evidence. If such articles were found in large quantity, beyond the apparent means of the party to acquire honestly, this would still further increase the strength of the evidence. If the party should, in addition to all these things, tell lies about the property, and attempt to dispose of it under false pretenses and representations, the evidence would become conclusive beyond all reasonable doubt. In this case the evidence seems satisfactory that the defendant was guilty of the offense charged.

The only remaining question to be discussed is, did the Court err either in giving its instructions or in withholding those asked by the defendant. The first portion of the charge to which exception is taken is, that the Court charges the jury that they must find the prisoner guilty of murder in the first degree, murder in the second degree, or not guilty; thus taking from them the right to find the prisoner guilty of manslaughter.

The evidence here shows, if it shows anything, that deceased was killed at a late hour of the night or in the morning in her bed, and

that after the killing, the house was robbed. There is no testimony attempted to be introduced by defendant showing or attempting to show the killing might have been done in a quarrel or fight. The law presumes that every unlawful voluntary killing is murder.

In the absence then of any explanatory evidence, the defendant was guilty in the eye of the law of murder, or nothing. It was therefore proper to give the charge as above stated. If it was proper under such a state of facts to charge the jury they might in their discretion find the prisoner guilty of manslaughter, it was equally proper to charge they might find him guilty of an assault to commit murder, or even guilty of a simple assault, for both of these are crimes of which a party under our statute may be convicted upon an indictment for murder. Yet in a case where a party was beyond all question slain and another party indicted for the murder, it would seem ridiculous to charge the jury that they might find the defendant guilty of a simple assault.

Appellant quotes the following language from the Judge's charge, and complains that it is erroneous :

"If you believe from the evidence that about the nineteenth day of January last, at Virginia, Storey County, the defendant, with malice aforethought, either expressed or implied, and with deliberation and premeditation, did unlawfully kill Julia Bulette, with intent to take her life, it will constitute murder of the first degree ; and you should so find ; otherwise you will acquit."

The objection to this is, that in effect the Jury are instructed what it takes to make murder in the first degree ; and after being so instructed, they are told that if they cannot find these circumstances to have attended this killing, they must acquit the defendant. If there is any objection to this instruction, it is too favorable to defendant. The jury are instructed in effect, if you fail to find that the killing of this woman was attended with a deliberate and premeditated intent to kill (circumstances which raise the offense of simple murder to murder in the first degree) you will acquit the defendant although you may believe he was guilty of the crime of murder ; that is, of killing the deceased with malice aforethought, but without a deliberate or premeditated intent to kill. If then, this instruction was erroneous,

a point we will not now discuss, it was an error in favor of, not to the prejudice of the prisoner.

The next language complained of is this: "If you believe the defendant guilty of an offense, and doubt as to the degree, you can only convict of the lowest degree of crime within the grade of the one charged—murder in the first or second degree."

This language is not technically correct, but could not operate to the prejudice of defendant if we are right in the first views expressed about the Judge's charge. That is, that there was no testimony before the jury authorizing them to consider the guilt or innocence of the prisoner in regard to any crime less than murder.

In another portion of the charge the Judge, after speaking of the unsatisfactory character of conclusions drawn from the mere fact of the prisoner being found in possession of stolen property, adds: "It will be necessary for the prosecutor to add the proof of other circumstances indicative of guilt in order to render the naked possession of a thing available to a conviction, such as the previous denial of the possession by the party charged, or his refusal to give any explanation of the fact, etc."

This language is complained of because, says counsel for appellant: "This language unexplained led the jury to conclude that the defendant's failure to testify and explain these things when the law held out to him an opportunity to do so, accompanied by proof of the possession, would warrant them in finding a verdict of guilty."

At common law the failure of the prisoner to account for the possession of stolen goods was held a strong circumstance against him, although from the rules of evidence under that system it was frequently difficult if not impossible to do so. At least it might be impossible even for an innocent man to account for his possession under the rule of evidence as established at common law.

This instruction would formerly have been correct. Surely it cannot be incorrect now, because the prisoner has one means of accounting for stolen goods in his possession, which he did not have at common law.

In another portion of the instruction the jury were properly cautioned against giving any effect or weight to the silence of the prisoner. The same observations we have made in regard to this

latter point will apply to some other matters contained in the charge.

That portion of the charge which at first blush seemed to the writer of this opinion most questionable, is contained in the following language :

“The distinction between murder of the first or second degree is quite nice. I will briefly state such distinction, although from the testimony I apprehend that you may conclude that the defendant was either guilty of murder of the first degree, or innocent.”

Our Constitution provides that “Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law.”

This language is contained in many of the newly adopted State Constitutions. When it was first introduced, or where these peculiar expressions originated, we have been unable to find in the limited period we have devoted to the subject.

Nor have we found much adjudicated as to the force of these expressions, or the construction to be put upon them.

The California Constitution contains the same language, and the Supreme Court of that State, in the case of the *People v. Ybarra*, 17 Cal. 170-1, use this language: “The jury,” says Chitty, “are as much judges of the fact as the Courts are of the law, and have an absolute power to acquit or convict; and it would be a great responsibility for the mind of a Judge if he were to decide on the guilt or innocence of the prisoner. (1 Chit. Crim. Law, 528.) The rule at common law appears to be that a Judge may express to the jury his opinion in regard to the weight of evidence. (*Commonwealth v. Childs*, 10 Pick. 252.) But it has been held in Alabama that a Court should not charge as to facts, even in a civil case. (*Tubbs v. Madding*, 1 Minor, 129.) It is unnecessary to inquire whether the instruction in this case was in violation of the principles of common law; it was clearly within the prohibition of the Constitution, and cannot be maintained without disregarding the express provisions of that instrument. The language of the Constitution is: that ‘Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.’ (Const. Art. VI, Sec. 17.) This provision is violated whenever

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a Judge so instructs as to force the jury to a particular construction upon the whole or any part of the case, or to take away their exclusive right to weigh the evidence and determine the facts. The meaning of the provision is, that the Judge shall decide upon the law and the jury upon the facts, and that the former shall not invade the province nor usurp the powers of the latter. The Judge has no more right to control the opinion of the jury upon a matter of fact than the jury have to disregard the directions of the Judge upon a matter of law."

From the views here expressed, we should say that the Court in effect held that this clause in the Constitution is but an affirmance of the common law principle, that the Court is to be the judge of all questions of law and the jury of all questions of fact. So far as the testimony is concerned, the Court is usually the exclusive judge as to its admissibility; the jury must determine as to its weight, after admitted. But whilst the jury can determine as to the weight and credibility of testimony, the Court may certainly at common law determine whether there is, or not, any testimony tending to prove a certain fact or facts which are essential to sustain an action or support a prosecution. It is on this principle that Courts daily grant nonsuits in civil cases, and in criminal cases direct or advise juries to acquit.

If a prisoner is under indictment for murder, and the prosecution fails to establish the fact by at last reasonably conclusive testimony that the person charged to have been killed is really dead, the Court would not hesitate to direct or advise the jury to acquit. So too when a party is charged to have committed murder by poisoning, and all the proof is directed to such a charge, and the deceased is shown to have died by poison and not by any other kind of violence, surely it would not be improper in the Judge to say that all felonious and willful poisoning which proves fatal is murder in the first degree; and as there is no charge or proof against defendant that he caused the death of the party he is accused of murdering in any other way than by poisoning, therefore I advise you there is no proof to justify a conviction of murder in the second degree or manslaughter. Therefore, if you are fully satisfied that the prisoner caused the death of deceased by poisoning, you will convict of

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murder in the first degree. But if you have any reasonable doubt on this subject you will acquit. Such an instruction seems to us in such a case not only proper, but where the testimony is doubtful, necessary for the protection of the prisoner. Otherwise the jury, when they are not fully satisfied of the guilt of the prisoner, might compromise with their consciences by finding him guilty of an offense which would not deprive him of life.

In the case of the *State v. Phillips*, 24 Mo. 475, referred to by Bishop in a note to section five hundred and sixty-five of his valuable work on Criminal Procedure, the Appellate Court seems to have granted a new trial because the Court below gave instructions in regard to murder in the second degree, under which instructions defendant was found guilty of that offense, where the indictment was for murder in the first degree, and we infer [for we have not the twenty-fourth Missouri Reports to examine] the testimony was such that he must have been guilty as charged, or not guilty at all. So far as we can understand the case, it sustains the views we have here expressed, and even goes further than perhaps we would be willing to go. With our present impressions we should certainly hesitate to grant a new trial merely because the jury had found him guilty of a less offense than the one really committed, unless indeed he himself had distinctly asked the jury to be instructed that they must find him guilty of the higher offense or none. Then, if there was no pretense of there being any evidence to justify the lower degree of crime, it would become a serious doubt if the prisoner would not be entitled to a new trial or a discharge. But it will perhaps be time enough to meet this question when it arises. For this case it is sufficient to say, it is in our opinion no violation of the constitutional provision referred to for the Court, in a clear case, to instruct the jury that there is, in the opinion of the Court, no evidence tending to convict a prisoner of any lower grade of offense than the one charged. If however there is any evidence at all, however slight, on any reasonable theory of the case consistent with the evidence given, under which the defendant might be convicted of a lower grade of offense than the one charged, then the Court should instruct as to the nature of both, or of any offense of a lower grade of which the prisoner might by possibility be found guilty,

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leaving the jury to determine all questions of fact about which there might be any controversy among reasonable men.

Taking the testimony and the legal presumptions arising therefrom in this case, and there could be no question but that the offense was of a higher grade than manslaughter. Whether it could have been held to be of a lower grade than murder in the first degree by a reasonable being, may be somewhat doubtful. Whether it could or not, the mere expression of the Judge that he thought the jury, under the evidence given, might conclude either that the prisoner was guilty of murder in the first degree or else not guilty, when accompanied with a clear and explicit instruction as in this case, that the jury might find him guilty of murder in the first or second degree, is not error injurious to the prisoner.

There is nothing wrong in the definition of murder in the first degree, as given by the Court to the jury—at least nothing to mislead the jury. There is no real distinction in the meaning between the word “inferred,” as used by the Court, and “implied,” as used in the statute. Nor was it necessary for the Court to tell the jury that murder by lying in wait, poison, etc., was murder in the first degree. There was no evidence or charge of such killing in this case. It was sufficient to show that where the killing was willful, premeditated, unlawful killing, it amounted to murder in the first degree.

The next complaint of appellant is that the Court instructed the jury that the intent to kill “need not have existed for any given length of time before the killing.” In other words that willful, deliberate and premeditated killing might take place in cases where the design to kill was formed at the very moment of striking the fatal blow. This we think the settled law. (See the case of *The People v. Clark*, seventh New York, 3 Selden, Court of Appeals, pp. 385 to 395; see also, Wharton’s Criminal Law, Sec. 1,113.) The case of *Sullivan v. People*, 1 Park, Criminal Report, was overruled in the case cited from seventh New York, and the Iowa case alone stands to support appellant’s views, against numerous authorities on the other side.

We apprehend the true difference between simple murder (or murder in the second degree) and murder in the first degree,

under our statute, does not consist in the length of time the murderer must have deliberated, but whether he had, at or before striking the fatal blow, formed the design to slay his victim. If such design was formed, however recently, it will be murder in the first degree.

If it be asked, what is the distinction between willful, deliberate, premeditated killing, under our statute, and killing with malice aforethought; the answer is that malice aforethought, as used in the old common law indictments, did not necessarily imply that there was any preconceived intent to take life. The malice aforethought may have been only a preconceived intent to commit some other felony. If, for instance, in our State, a party were to attempt, upon a preconceived design, to commit mayhem, and the blow given in the attempt should prove more serious than was intended, and produce a fatal result; this would be murder. The preconceived intent to commit a felony would furnish the ingredient of malice aforethought. But in such supposed case, there is no willful, deliberate or premeditated intent to kill; consequently the crime would be but murder in the second degree.

Appellant objects to the following language used in the Judge's charge: "By reasonable doubt is ordinarily meant such a one as would govern or control you in your business transactions or the usual pursuits of life." This is objected to on the authority of *Jane v. The Commonwealth*, 2 Metcalf, Kentucky Reports, p. 30, referred to also in the twentieth U. S. Digest, p. 482, Sec. 142.

An examination of the case in second Metcalf does not, in our opinion, support the views of appellant. We do not deem it necessary to go into an analyzation of the Kentucky case to show the distinction between that and this. Suffice it to say that the peculiar phraseology of the instruction in that case was such as in the opinion of the Appellate Court might perhaps have induced the jury to believe they were to weigh the testimony and decide the case on the weight of testimony. Here there is no such complaint. The jury were plainly told that if they had any reasonable doubt as to defendant's guilt they must acquit.

There does not appear to be any serious objection to the instructions given, other than that they are too long and contain many

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things which were unnecessary and rather calculated to confuse than enlighten the jury.

Among other instructions asked by the prisoner were the following: "The jury is instructed that the fact that the clothing or other property of the deceased was found in the possession of the defendant after her decease is not sufficient of itself to warrant the jury in finding the defendant guilty under the indictment against him." "You are instructed, even if you find the goods belonging to deceased in her life were in possession of defendant, that this is a fact by no means conclusive, but one 'whose persuasive power is very slight.'"

Both these were refused by the Court, and the prisoner's counsel excepted.

We are of opinion the Court did perfectly right in refusing these instructions. It is true, the mere fact of finding property that had belonged to deceased in the possession of defendant, might not be sufficient to warrant his conviction, or even to raise a reasonable suspicion against him. For instance, had the defendant been a pawnbroker, and had there been a single article, or only two or three articles of property which had belonged to deceased found exposed in his shop window, this would hardly have been a suspicious circumstance. On the other hand, the number and value of the articles found, the place where they had been concealed or deposited before found, and other circumstances which we can imagine connected with the finding, might clearly indicate the defendant's guilt.

To give them such instructions as these is simply calculated to mystify and confuse the jury. The Court did perfectly right in refusing to give them without the necessary and proper qualifications.

The Court did, in fact, give these instructions in the charge to the jury with the proper qualifications and explanations, as the following extracts from the main charge will show:

"The testimony in the case tends to show the property of the deceased, or some portion of the same, in the possession of the defendant, at a time subsequent to the alleged murder, and at quite a recent date. The degree of weight to which this character of

testimony is entitled in law is laid down by Greenleaf in his work on Evidence, and I have extracted from and incorporate as a part of my instructions to you, a portion of section thirty-one of the third volume: 'The caution necessary to be observed on this point applies with more or less force in all criminal trials, but from the nature of the case is more frequently and urgently demanded in prosecutions for homicide and larceny. We have heretofore adverted to the possession of the instruments or the fruits of a crime as affording ground to presume the guilt of the possessor; but on this subject no certain rule can be laid down of universal application; the presumption being not conclusive but disputable, and therefore to be dealt with by the jury alone as a mere inference of fact. Its force and value will depend on several considerations. In the first place, if the fact of possession stands alone, wholly unconnected with any other circumstances, its value or persuasive power is very slight, for the real criminal may have artfully placed the article in the possession or upon the premises of an innocent person, the better to conceal his own guilt. * * * *

"It will be necessary for the prosecution to add the proof of other circumstances, indicative of guilt, in order to render the naked possession of the thing available towards a conviction, such as the previous denial of the possession by the party charged, or his refusal to give any explanation of the fact, or giving false and incredible accounts of the manner of the acquisition; or that he has attempted to dispose of it, or to destroy its marks, or that he has fled or absconded, etc., or other circumstances naturally calculated to awaken suspicion against him, and to corroborate the inference of guilty possession.'

"If you should be satisfied from the evidence that the articles of jewelry, clothing and watches exhibited, or any of them, were in the possession of Julia Bulette at the time of her death, and were taken and carried away at said time, by the person who caused her death, and that the articles so taken were afterwards found in the possession of John Millain, defendant, it devolved upon him to explain and account for such possession by him, and unless he has explained his possession to have been by means not connected with the death of deceased, or upon any reasonable hypothesis of his

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innocence, and this fact being supported by other circumstances indicative of guilt, you will be warranted in giving such facts such weight as you may deem proper tending to establish guilt."

The record shows that the jury did not see the instructions refused, or hear them read; so there was no harm done to the defendant by the Court refusing to give these instructions without explanation.

Mere abstract principles of law not applicable to the state of facts found in the case, should not be given by way of instruction to a jury.

I am of the opinion that the judgment should be affirmed, and the Court below directed to fix a day for carrying its sentence into execution.

Opinion by JOHNSON, J.

There are numerous questions presented by this appeal, all of which have been very thoroughly considered in the foregoing opinion of the Chief Justice; and as I agree with him in the conclusion attained therein, I consider it unnecessary to review all the points made on defendant's behalf, and shall therefore restrict my inquiries to the more material questions wherein I do not fully coincide with our brother Beatty in the reasoning he advances in support of such conclusions, together with some additional authorities bearing upon these questions, arising on the case.

In their consecutive order, the first error assigned is the refusal of the Court below to exclude D. Black from the panel of grand jurors. Upon being interrogated under oath touching his competency as a grand juror in this case, he stated that "he had heard of the charges against defendant, and had an opinion touching the guilt or innocence of defendant." "That he might be required as a witness for the purpose of identifying a piece of the property recovered as belonging to deceased." "That he did not know whether he would be called upon as such witness." "That he was not a prosecutor of defendant, and was taking no interest in his prosecution for the offense." Counsel for the defense thereupon challenged said Black for one of such jury, for this: "first, that he was a witness for the prosecution in reference to the charge against

defendant; second, that he had formed and expressed a decided opinion that the defendant was guilty of the said offense for which he had been held to answer." This assignment of error might properly be disposed of here without further inquiry.

The grounds stated by defendant's counsel on this point are not sustained by the record. Black says nothing about a decided opinion, a qualifying word peculiar to this portion of the criminal code, and evidently used in this connection so as to admit of persons on the grand jury who would be excluded under the more rigorous rule applied to trial jurors, whose opinions, formed or expressed, were "unqualified," as prescribed by the statute. The juror merely says that he "had an opinion touching the guilt or innocence of the accused." This alone was no sufficient ground for excluding him from the panel.

Furthermore, I cannot perceive wherein the presence of this juror at the grand inquest could, under any rule, statutory or otherwise, have prejudiced the rights or interests of the accused, as the record before us does not show that he was either a witness before the grand jury or upon the trial at which the conviction was had. And the record is so fully presented to us as to authorize us in believing that he was not a witness before either of the juries. As I have stated, in my judgment this point need not necessarily be pursued farther, but the earnestness and zeal with which counsel has pressed this question upon our attention (and the same remark in phrase yet more complimentary is justly due to that distinguished counsellor in respect to his conduct of the entire case) seem to call for a more extended examination of the questions involved in this point.

The insufficiency of these challenges must be tested by the statute law of the State, irrespective of the rule at common law or by the statutory regulations prevailing elsewhere. Sec. 180 of the Criminal Practice Act as originally adopted in 1861, specified as the only grounds of challenge to an individual grand juror: "first, that he is a minor; second, that he is an alien; third, that he is insane; fourth, that he is a prosecutor upon a charge against the defendant; fifth, that he is a witness on the part of the prosecution and has been served with process—or bound by an undertaking as

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such; sixth, that he has formed or expressed a decided opinion that the defendant is guilty of the offense for which he is held to answer." This section was amended by Act of the twenty-second of January, 1866, p. 49, (in force at the time this grand jury was empaneled) so as to read as follows: "A challenge to an individual grand juror may be interposed for one or more of the following causes, and for no other: first, that he is a minor; second, that he is an alien; third, that he is insane; fourth, that he is the prosecutor upon a charge or charges against defendant." Thus it will be seen, that the fifth and sixth subdivisions of the section were no longer in force—a fact which counsel for defendant had doubtless overlooked when he framed the objections to the juror Black.

This is inferred from the fact that the objections are stated in verbiage almost verbatim with that contained in the repealed parts of the section. The objection would not have been tenable under the former statute, much less under the Act as amended. The statement was simply that "he had an opinion as to the guilt or innocence of the accused," not that he formed or expressed any decided opinion: Nor did his statement show in the language or meaning of the former Act that he was "a witness on the part of the prosecution who had been served with process or bound by an undertaking as such."

But counsel furthermore insists that "even if a person expects to be a witness for the State," a challenge will lie under the fourth clause of the section, to wit: "the prosecutor upon a charge against the defendant." The form in which Section 180 stood in the original Act shows that a distinction was taken between "the prosecutor" and one who was merely a "witness." They are differently classified: one is definitely spoken of as *the* prosecutor—the other indefinitely as *a* witness; and if "prosecutor" was intended to mean "witness," and if no special significance or meaning attached to the word "prosecutor," in the fourth clause of the section, why the need of the fifth clause at all—but more especially why the object of limiting the challenge to such witnesses only "as had been subpoenaed or recognized to appear as such?" Under the section as it originally stood, it would scarcely be contended that a witness could be excluded from the panel on the

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ground that he was a witness for the prosecution, unless it also appeared that "he had been subpoenaed or recognized to appear as such;" therefore, whenever this qualified right of challenge has been withdrawn by the amendment it certainly cannot operate, as would be the effect of the rule urged by counsel, to further extend the rights of defendant, so as to include as grounds of challenge such as were not permitted before this amendment. As the law stood, a witness subpoenaed or held to appear as such, on behalf of the State, or one who had formed or expressed a decided opinion as to the guilt or innocence of a person accused of crime, was held to be disqualified as a grand juror in that particular case; but when these inhibitions were removed, the policy of which it is not our province to determine, we must conclude that the change was made for the express purpose of disallowing a challenge for either of these grounds, and thereafter to confine the privilege of challenge to the causes embraced in the other clauses of the section; any other conclusion is unsupported by the light of reason or authority. I conclude that the juror was not disqualified under the law.

Before leaving this branch of the case, I will further remark that, whilst I have no doubt but that the construction herein given to this section is correct, yet I have encountered some difficulty in determining the proper answer to defendant's counsel, as to the legal understanding of the word "prosecutor," as used in this Act. That it was intended in a different sense from the word "witness," I have already attempted to show; and for the purposes of this case, it is unnecessary, perhaps, to pursue the investigation further. From a somewhat extended range of examination which I have bestowed upon the questions arising here, I conclude this: that under our system of criminal practice, the word is used in a limited and greatly restricted sense. This word is adopted from the statutes of another State, where it is essential to the validity of an indictment that the name of the prosecutor shall be indorsed on the indictment. And such is the law in many of the States; but in every instance so far as I am advised, a marked distinction is taken between the one person known as the "prosecutor" and such as are merely witnesses. For illustration: the law in this particular in

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Pennsylvania, by the revised Act of 1860, provides that "No person shall be required to answer to any indictment for any offense whatsoever, unless the prosecutor's name, if any there be, is indorsed thereon; and if no person shall avow himself the prosecutor, the Court may hear witnesses, and determine whether there is such a private prosecutor, and if they shall be of opinion that there is such a prosecutor, then direct his name to be indorsed on such indictment." (American Cr. Law, Sec. 480.) In the same State, under an earlier statute, whilst it provided that "No person shall be obliged to answer to any indictment or presentment, unless the prosecutor's name be indorsed thereupon," no provision being made as in the later Act to ascertain who the prosecutor was, it was held "that the Act did not go so far as to require that a prosecutor should be indorsed, in cases where no prosecutor exists." (1 Dallas, 7.) I cite this authority to show that the distinction was constantly preserved between the mere witness and the prosecutor, as we cannot well conceive of an instance of an indictment being found by a grand jury without the presence of witnesses.

Authorities to the same effect as the above are numerous, many of which will be found collated in Vol. 1 Am. Cr. Law, Secs. 496-498. In this State, however, no such requirement obtains; but instead, the indorsement is made by the foreman of the grand jury, and the names of witnesses examined before such a jury are also required to be indorsed on the indictment. Now it may probably occur in many instances in criminal proceedings that in the sense the term is used in our code a witness may also be prosecutor, in which case of course he would be excluded under the fourth subdivision of the section referred to. Also, it may happen that there is a prosecutor who is not a witness, in which case the same rule would apply. It is not my purpose to attempt to show that this word as here used has no peculiar meaning, but the contrary. Inasmuch as this word occurs, I believe, in the one single instance in our Criminal Practice Act, it is quite impossible to lay down a general rule sufficiently comprehensive to cover its full meaning as here used. Probably the views of the Chief Justice on this point are substantially correct.

The second assignment of error is an objection to the trial of

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panel jurors. This objection was made orally and in general terms, thus: "In drawing and summoning there had been a material departure from the form prescribed by statute in respect to the drawing of said jury." Our statute, in respect to the allowance of challenges in such cases, recognizes a marked distinction that must be observed. "A challenge to an individual juror may be made orally, whether peremptory or for cause, and when peremptory no reason need be given." (Crim. Pr. Act, Secs. 335, 342.) "If the challenge be made to the panel, it must be in writing, specifying plainly and distinctly the facts constituting the grounds of challenge." (Id. Sec. 324.) Possibly the formal part of the law would be sufficiently complied with if the objections were noted on the minutes or records of the Court, so that they could be preserved in an authentic shape; but it is indispensably necessary that facts, and not mere conclusions from facts, be stated. A general statement of the ground of objection, as is the case here, is not enough. The need of this requirement will be apparent on inspection of several succeeding sections, in which provision is made for the trial of a controverted issue, whether of fact or law, arising upon matters set out in the challenge. This point is very fully and ably reviewed in reference to a matter bearing some semblance to this—that of a challenge to a trial juror in *Freeman v. People*, 4 Denio, 31, per Beardsley, J., and amply supports the conclusions here attained. The challenge was made in the case at bar in general terms. No specific facts were stated upon which an issue of either law or fact could be joined, but simply a general statement, which amounted to nothing more than a legal conclusion. This was clearly insufficient, and the Court very properly overruled the challenge.

Next for our consideration are the exceptions taken to the ruling made in reference to the trial jurors, assigned as the third ground of error, for what is termed in our statute "implied bias," and embraced within the eighth clause of Section 340 of the Criminal Practice Act: "Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." The diversity shown by the decided cases on the point under consideration led the late Judge Baldwin to remark that

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“upon no one question of civil or criminal practice have the decisions of Courts been more inharmonious than upon questions of qualifications of jurors arising from the formation or expression of opinion of the guilt or innocence of the accused.” (*People v. Reynolds*, 16 Cal. 132.) The state of the law on this point, from the opposing and contradictory character of the decisions, being so uncertain, induced the Legislature of California at its first session to settle, as was supposed, the rule of law by legislative enactment, and which provision we have introduced into our criminal statutes. As before shown, to disqualify on this ground, the opinion or belief formed or expressed must be an unqualified one. This enactment in California was followed by a decision of the Supreme Court (*People v. McCauley*, 1 Cal. 379) in which the statute was fully upheld and enforced. But in course of time the rule under this statute, as afterwards interpreted by the same Court, became much relaxed; and ultimately not only this decision, but the statute also, was practically nullified, so that when the learned Judge made the statement just quoted, the decisions of that Court on the point in question furnished no exception to other evidences of the undoubted act. These opposing and contradictory rulings necessarily produced much confusion and embarrassment in the trial of criminal cases, especially those of the highest grade; until finally the Court resolved on a convenient occasion to review the question, and establish a fixed and definite rule, conforming to the evident meaning of the statute. Fortunately this labor was intrusted to one eminently qualified, the result of which was the very fully considered opinion pronounced in the case we have cited from the Sixteenth California Reports. This has been accepted as a correct exposition of the law, and remains, I believe, to the present time unquestioned in their highest Court. Indeed, the principles then enunciated have been applied in a number of cases since then, particularly in *The People v. Mahoney*, 18 Cal. 180. The facts upon which a challenge was denied in that case are not materially different from this. In my judgment the construction given to this part of the criminal code by these later decisions is the correct one. Applying these principles to the case made by the answers of these jurors, I must hold, with the Chief Justice, that the ruling of the Court was correct in disallowing the challenge.

The fourth ground of error is the refusal of the Court below to change the venue. This application is preferred under the provisions of Sections 306 and 308 of the Criminal Practice Act, and is supported by several affidavits. The distinct ground of application is that a fair and impartial trial cannot be had in the county, and which, under the code, "must be granted if the Court be satisfied that the representation of the defendant be true." Counsel lays much stress upon the circumstance that the matters contained in the affidavits, showing why this change should be had, are not refuted by opposing evidence; and he claims that these statements must be accepted as true. Admit this is so: does it necessarily follow that the representation of the defendant that he cannot secure a fair and impartial trial in the county is also true? By no means. The Court must determine the question by all the circumstances surrounding it, and be guided in its judgment, stating the proposition in the form in which counsel presents it, by the exercise of a reasonable and legal discretion. Now the particular facts and circumstances detailed in these affidavits, independent of the representation of defendant as to the trial, might be literally true, and yet from so populous a community as inhabit Storey County a fair and impartial jury be secured for the trial of the accused.

This probably was the conclusion of the Judge, and whilst he was unwilling to embarrass the prosecution by granting a change of venue without an effort to secure a jury within the county, he distinctly notified the defendant's counsel that he might renew the motion if it should afterwards appear difficult to procure such jury. Under the circumstances, it seems to me the Court evinced a proper and considerate regard for the rights of both the prosecution and defense, (for certainly the prosecution has rights as well as the defense, although in practice it often is the case that the rights of the one are lost sight of in the anxious endeavor to screen the guilty from merited punishment) and as it does not appear that the motion was renewed, we may infer that the defense were willing to chance a jury in that county.

A decision in point is contained in *People v. Plummer*, 9 Cal. 298, where on appeal, the lower Court was sustained in its ruling on a similar question. Also, in *People v. Mahony*, 18 Cal. 180,

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an authority cited by defendant's counsel and commented on by the Chief Justice. The last is probably even a stronger case against the defendant, for it will be seen that notwithstanding Mahony made out a very strong case, the Court overruled the motion, with leave to renew it, which he did do on the same day and again the day after, and each time it was refused. This ruling was sustained on appeal.

Appellate Courts are at all times exceedingly loth to disturb a judgment in a criminal case solely on the ground that the *nisi prius* Courts have refused a change of venue, and the instances are of rare occurrence where it has been done. For instance, in California, of a large number of appeals going to the Supreme Court, involving this question, I find but a single one, *People v. Lee*, 5 Cal. 353, where the judgment was reversed on this ground, and even that decision is sharply criticised in the later case of *People v. Graham*, 21 Cal. 261, and held to be unreliable as authority. I conclude there is no error in the ruling of the Court refusing the change of venue.

The fifth and sixth grounds of error may be considered under one head, as all the exceptions go to the alleged defects in the indictment. The objections taken by counsel on these points may be summed up thus : first, the criminal code requires of an indictment for murder that it shall contain all the essential averments needed at common law ; or second, if the code has dispensed with any of the essential averments required at common law, the Act itself is unconstitutional.

Neither of these positions is tenable. The criminal code which in Section 232 has declared "all the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings are to be determined, shall be those which are prescribed by this Act," conveys no words of idle meaning, but is the mandate of the law which Courts should regard and obey. The very full and complete showing by the Chief Justice of the various sections of the code bearing on this question, shows how zealously the law-making power have endeavored to abolish needless "technicalities and subtleties invented as the means of administering justice, and in their stead substituted a system of pleading founded upon the unerring prin-

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ciples of justice, and having for their end the attainment of right without regard to form." It is true there is some conflict in the decisions growing out of these statutory modifications, but wherein they have not given full expression to the spirit and purpose of the code they are but the occasional exhibitions of a "conservatism," as it has been termed, "of a profession which would impede but cannot arrest the progress of a more enlightened understanding of the true principles upon which the science of the law is founded; that would cling with a blind subservience to rules originating in a day of comparative darkness, rather than be guided by the simpler precepts which a reformatory and progressive spirit has inaugurated." These questions must be tested by the statute law, so far as it has pointed out the mode of procedure; and authorities which in effect ignore the distinct and emphatic rules that it has prescribed can serve no purpose in determining our action. "The object of pleading, whether in civil or criminal actions, is to inform the parties of the facts alleged by each against the other with such clearness and distinctness as to enable them to prepare for the trial of disputed facts, or for the application of the law to those which are admitted. Refine as we may upon the mode of effecting this object, the most devoted worshipper of the ancient forms will not deny that this is the only legitimate object of pleading. And in its application to criminal cases, in which no special pleading is required on the part of the defendant by the code (except where a former conviction is pleaded, which must be in a brief, prescribed form) the elements of pleading may be still further condensed into this definition: that it is a statement of a crime imputed to the prisoner, with such a particularity of circumstances only as will enable him to understand the charge and prepare for his defense, and as will authorize the Court, applying the law to the facts charged, to give the appropriate judgment upon conviction." (Report of Code Commission, New York, 1849, p. 141.)

Our criminal code originated with the Code Commissioners of New York. When originally adopted in 1861, it was confessedly a copy of the California Act of May 1, 1851, but this in turn was conceded to be an adaptation of the code reported by the New York Commissioners to the Legislature of that State two years before, but (I

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believe) not then enacted. I have compared this with the California and Nevada Codes, and discover no difference in respect to any question arising here. The New York Code Commission were lawyers of distinguished repute, and at least upon questions involved in the subject matter of their official duty, their opinions are entitled to great if not controlling weight. Now, in view of the analogies between our code and the one prepared by the New York Commission, it is a significant fact that the form of indictment in the case at bar fully meets the requirements of a form contained in the report of such Commissioners, and intended to supersede the more complex and common law form then held necessary under the revised statutes of 1828. I will not cumber these pages by giving the old form, but quote from their report the form they deem sufficient (of course made applicable to the facts of a particular case) under a code of criminal procedure which I have shown has been adopted substantially here. This form is given as follows :

“ Court of Oyer and Terminer, of the County of Columbia. *The People of the State of New York* against *John Jones*. John Jones is accused by the Grand Jury of the County of Columbia by this indictment, of the crime of murder committed as follows : The said John Jones, on the first day of January, 1849, at the City of Hudson, in this county, without authority of law, and with malice aforethought, killed William Green by riding over him with a horse.”

It has been said that the decisions are conflicting as to matters necessary to be stated in an indictment, yet upon careful examination I think it will be found that, with the exception of the California cases, which I shall presently notice, this conflict is more apparent than real. In probably all of the States, crimes and punishments are defined by statute. In some cases the mode of procedure by indictment is left, as at common law, with the modifications introduced by early English statutes ; in fact, that which may be regarded as the American common law. In other States the statutory changes in respect to the form of an indictment preserve the essential qualities required at common law ; whilst in a few instances, of which California and Nevada are examples, the modifications introduced by their codes have left but feeble traces of the formality and precision requisite at common law. So that when we say that our statute

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dividing murder into two degrees is precisely as felonious homicide was by Statute 23, Henry VIII, C. I. Sec. 3, divided into two degrees, (which were afterwards termed murder and manslaughter) or that the Pennsylvania Statute of 1794 is similar to our own in the definition given to murder of the first and second degrees, we shall not fail to notice the differences which were required in indictment and trial of one accused upon such charge under these statutes and our own. These differences are so perceptible as to render the decisions founded upon them of but little value in determining this question under the code prevailing here. The author mainly relied upon by defendant's counsel (Bishop on Criminal Procedure) keeps this distinction constantly in view, and illustrates the texts by numerous references in the accompanying notes to the changes which statutes in different States have introduced in this particular. In California, with a code of criminal procedure as already stated, in all essentials like our own, it is true there is an irreconcilable conflict in the decisions. Counsel cites several cases from the sixth and ninth volumes of these Reports in support of his views, and undoubtedly to the extent of these authorities he is sustained. The later cases of *People v. Stevenson*, 9 Cal. 273; *People v. Dolan*, 9 Cal. 576, and *People v. Judd*, 10 Cal. 313, in part overrule the principles held in 6 Cal. 208 and 236, and 9 Cal. 31 and 54; and in *The People v. King*, 27 Cal. 507, the question is thoroughly and ably considered by the Supreme Court of that State; and in a more recent case, *The People v. Cronin*, (see *Sacramento Union*, Nov. 13th, 1867) it reviews the case of *The People v. King*, before cited, and distinctly reaffirms the rules stated in its decision in the *King* case, and therefore these latter decisions must be considered as being the settled law under the code in that State, as to the requisites of a good indictment. The principles enunciated in these last two California decisions have direct application to the question at issue here, and in my judgment, enunciate the correct rules of construction to be applied in practice under the code. And it would seem that the reform suggested by the Code Commissioners of New York, and adopted first in the new State of California, and afterwards introduced here, was but the forerunner of a yet more radical change to be introduced into England—the fountain-head of the

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common law. From a recent publication (the *American Law Review* for October, 1867) we learn that the form of an indictment for murder now in use there, is as follows :

“ Gloucestershire, to wit : The jurors for our Lady the Queen, upon their oath, present that A. B., on the tenth day of July, in the year of our Lord, 1866, feloniously, willfully, and of his malice aforethought, did kill and murder C. D.”

Counsel further insists that a constitutional right of defendant's is violated, because the indictment does not conform to the requirement at common law, and founds his objections on a part of Section 8, Article I, of the State Constitution, which provides that no person shall be deprived of life, liberty or property, without due process of law.” The same rights are preserved in Article V, of amendments to the Constitution of the United States, which is held to be a restriction of the Government of the United States, and the proceedings of the Federal Courts, and does not apply to the State Governments. But this is of no moment, as we observe the same provision obtains in the State Constitution. It has been universally held, under a like constitutional restriction, that it does not mean “the process”—or otherwise expressed—“the proceeding” shall be the same as pursued at common law, but that the mode and manner of their procedure may be regulated and prescribed by statute. The authority which counsel cites on this point (2 Bishop Crim. Prac., Sec. 585) is not opposed to this principle ; for when the author questions such legislation as being unconstitutional “by reason of its being in conflict with provisions written in the Supreme law,” he undoubtedly refers to that part of the Massachusetts Constitution called the Declaration of Rights, Part 1, Article 12, wherein is contained the following provisions : “ No subject shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally described to him.”

That such was the sense in which the question is considered by the authority cited, there can be no doubt, for he says : “ The Constitution of the States differ, and for the present discussion, it will be sufficient to refer to the Constitution of Massachusetts * * *.” If our Constitution was in terms like that of Massachusetts, (in New Hampshire the same language is used in their Constitution)

requiring that "a crime or offense shall be fully and plainly, substantially and formally described to him," I apprehend there could be no doubt that the indictment in this case would be insufficient; and indeed that such constitutional requirement could not be met by an indictment which fell much short of the requisites at common law.

The seventh point—the insufficiency of the evidence to warrant the verdict—is suggestive of a very important question, involving a feature of our Constitution, and one upon which Courts have somewhat differed. The jurisdiction of this Court on appeal is limited "in all criminal cases in which the offense charged amounts to felony, to questions of law alone." (Sec. 4, Art. VI, Const.) And the inquiry arises here, to what extent may this Court, and incidentally a District Court, control the verdict of a jury on the ground of an insufficiency of the evidence to justify the verdict. Some authorities hold that in its broadest sense it is a question of law, and the verdict of a jury on these grounds may be set aside; whilst others make a distinction between cases where there is no evidence of a material fact, and where there is some evidence. Greenleaf in his *Treatise on Evidence*, Volume 1, page 49, says: "Whether there be any evidence or not, is a question for the Judge. Whether it is sufficient evidence is a question for the jury;" and as we gather, more particularly from the point made by the State's Attorney and the dissenting opinion of two Judges of the Court, this distinction was recognized by the Supreme Court of California in the *People v. Jones*, 31 Cal. 505. This question in the case before us was not argued by counsel, and therefore I am unwilling to pass upon it, as it is not necessary in the ultimate disposition of the appeal, and therefore any question on this point, so far as I am concerned, must be regarded as open for the future ruling of the Court. If the constitutional objection holds good, that we have no license to award a new trial upon the ground that the verdict is unsupported by the evidence, to which conclusion my present impressions lead me, then the judgment should be affirmed.

On the other hand, if it be a question whether there is any evidence or not in respect to any material fact necessary to be established by the prosecution, I can discover no sufficient reasons why the verdict of the jury should be disturbed.

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The only remaining ground of error assigned by counsel, relates to the charge given the jury by the Court below, and refusing certain instructions asked on behalf of defendant. These questions have been most thoroughly and in my judgment satisfactorily answered in the opinion of the Chief Justice, and concurring with him in both his reasoning and conclusions on the point, I must hold the exceptions not well taken. After a careful and protracted examination of the many questions raised by the defense, and enforced by the arguments of counsel of surpassing zeal, industry and ability, I can in no respect discover wherein any substantial right in the defendant under the law has been violated; wherefore I concur in the opinion of the Chief Justice that the judgment be affirmed, and the Court below appoint a day to carry into execution the sentence already pronounced.

Dissenting opinion of LEWIS, J.

The Judge's charge in this case is very lengthy and generally very clear and correct, evincing a thorough understanding of the law of the case; but I find two instructions which do not show the same caution which the balance of the charge exhibits. These instructions are, in my opinion, fatally erroneous, and entitle the defendant to a new trial.

The first of them reads as follows: "The distinction between murder of the first and second degree is quite nice. I will briefly state such distinction; although from the testimony I apprehend you may conclude that the defendant is either guilty of murder of the first degree, or innocent."

In my judgment this portion of the charge is a clear violation of Sec. 12, Art. VI, of the Constitution of this State, which declares that "Judges shall not charge jurors in respect to matters of fact, but may state the evidence and declare the law."

The primary object of this section, doubtless, is to secure to the individual more perfectly and completely those advantages which are supposed to exist in the right of trial by jury; to leave to their uninfluenced judgment the finding of the facts. It has always been the theory that the jury are the arbiters of the facts, whilst the Judge is the expounder of the law.

Ad questionem facti non respondent judices; so ad questionem juris non respondent juratores, says Lord Coke: "It is the province of the jury to decide the facts and of the Court to decide the law," is an expression which is found stereotyped through the books. It seems to me this expression either means that the jury are the exclusive judges of the fact, or it means nothing at all; for if the Judge and jury together are to be the judges of the fact, then the duties of the Judge are not properly defined by the expression that it is his province to declare the law, for if he has any voice in the decision of the facts, he not only decides the law, but also the facts.

The theory certainly is and always has been that the jury are the exclusive judges of the facts. When the Judge, therefore, gives his opinion as to what is or is not sufficiently proven, he steps beyond the limits which the law prescribes for him and invades the province of the jury. This, it seems to me, is not only the correct theory upon which the right of trial by jury rests, but is the only practice which will give the litigants the full benefit of the cool and deliberate judgment of the jury, who are sworn to decide the issues according to the evidence. The Judge is not sworn to do so, yet it is well known that his opinion as to the weight of the testimony has a powerful and often a controlling weight with the jury. His position, character, and learning give to his opinion great weight and influence, whilst in the mere weighing of evidence or judging of the credibility of witnesses, he may be no better qualified than any individual member of the jury. If therefore the Judge be allowed to give his opinion upon the conclusions of fact to be drawn from the evidence, it is clear the trial by jury would often be a mere mockery. It would be but the ridiculous practice of selecting twelve men to announce the opinion of one. Upon this subject Graham & Waterman, in their valuable work on New Trials, make some very just and sensible remarks, and fully express my views upon it.

"The Court and jury," says the author, "have separate and totally distinct offices to perform. Each should confine itself rigidly to its own sphere. It should never be forgotten that the former is to decide the law and the latter the facts. The idea that the jury cannot agree upon a verdict unless the Judge imparts to them his notion of what it should be is not only erroneous, but often leads to

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great abuse. If the weight of testimony be clearly on one side, any such suggestion from the Judge is unnecessary. If the evidence be conflicting, it is manifestly improper for the Judge to throw his opinion into either scale. If the issue were to be tried by Judge and jury, and not by the jury alone, it would not only be proper but the duty of the Court to make its impression of the evidence both known and felt. As however our Courts are at present organized, the exercise of such an influence is plainly an usurpation and an injury to the party against whom it is employed. The law of a case can be stated and the evidence reviewed and commented upon so as to assist the jury in their deliberations, without improperly influencing or directing them. Further than this Courts are not called upon to go, nor was it ever contemplated that they should." I am fully aware that the decisions of the Courts generally do not support this view of the respective duty of the Judge and the jury. In criminal trials in England the Judges have usually exercised a controlling influence upon the verdict of the jury, and in that way they seldom failed to convict a prisoner who had the misfortune of being obnoxious to the Crown.

Sir William Blackstone, whilst admitting that the English Judges have passed beyond the limits prescribed by the British Constitution, apologises for it as a necessity resulting from the incapacity of jurors to determine the nice and intricate questions which were sometimes submitted to them. He says: "All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusation, and sometimes to dispose of the lives of their fellow subjects by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite, especially when the law and fact, as it often happens, are intimately blended together. And the general incapacity even of our best jurors to do this with tolerable propriety has greatly debased their authority, and has unavoidably thrown more power into the hands of the Judges to direct, control, and even to reverse their verdicts than perhaps the Constitution intended." (1 Black. Com. 8.)

In our own Courts there is a diversity of opinion as to how far

the Judge may go in giving his opinion upon the facts, some of the Courts holding, as in Massachusetts, "that strictly speaking no opinion of the Court on a question of fact is open to exception," whilst other Courts hold that the Judge should give no opinion respecting the conclusion to be drawn from contested facts. Judge Mills, speaking for the Kentucky Court of Appeals in *Bowman v. Bartlett*, 3 A. K. Marshall, declares this rule in the following language :

"The next instruction asked and refused by the Court was, that the defendants had shown no privity and connection between the patents of Innes and their possession. This was a question requiring the opinion of the Court with regard to some of the facts in the cause, and ought not to have been given if there was any evidence conducing to establish the facts. The Court is the proper judge of what evidence conduces to establish a fact ; but when such evidence is given the Court ought not to express an opinion on its sufficiency, but leave its weight with the jury, except in those cases where the evidence is admitted with all its force, as is sometimes done by a demurrer to evidence, and proceedings of a like nature."

It is observable that the authorities have established no clear and definite line between the province of the Judge and that of the jury in this respect. But in my judgment that section of the Constitution which is quoted above establishes that line, restores the practice to a closer conformity with the theory, and gives to litigants the right of having the facts in their case decided by a jury uninfluenced by the opinion of the Judge. This section clearly prohibits the Judges from giving their opinion upon any contested fact in the case, or saying to the jury what may or may not be sufficiently proven. Thus the jury, who theoretically have always been considered the judges of the fact, are practically made so. They who are sworn to decide the issues between the parties according to the evidence are thus left entirely free to determine the fact as their judgment may dictate, uninfluenced by any consideration but the evidence in the case. If there be any reason why the jury should not be influenced by the opinion of the Judge upon matters of fact, given as a direct charge, surely the same reason exists against such influence, though exercised by a mere insinuation or

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intimation of opinion ; for, as I have already said, a mere intimation of opinion by the Judge often makes as much impression upon the jury as a positive direction to find in a certain way. If the object of the Constitution be to remove the jury beyond the influence of the Judge in the decision of matters of fact, (and I think such to be the object) the manner in which that influence may be exerted is certainly a matter of no consequence, whether it be by a direct and positive instruction as to what may be established by the evidence, or by the simple intimation of an opinion. It seems to me, therefore, that the spirit of the Constitution as peremptorily prohibits the intimation of an opinion by the Judge as to what may or may not be sufficiently proven, as a direct charge to that effect.

But the Judge below in this case gave it as his opinion to the jury that the testimony established one of two facts: either that defendant was guilty of murder in the first degree or that he was innocent. Thus his opinion is given to the jury that the evidence did not justify a conviction of murder in the second degree. That may have been a fact. The Judge may have drawn the correct conclusion from the evidence, but he was not to decide whether the evidence established murder in the first or murder in the second degree. That is made a question of fact to be decided by the jury ; Section 17, Laws of 1861, p. 59, declaring that "the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be for murder of the first or second degree."

Here, then, the Judge below charged the jury as to a matter of fact ; gave it as his opinion that if the defendant committed the homicide it was a willful, deliberate, and premeditated killing—that is, murder in the first degree. Where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, (in all these cases it being expressly made under the first degree) the degree of the offense depends entirely upon the question whether the killing was willful, deliberate, and premeditated. In other words, whether the killing was the result of a deliberate intent to take life.

The degree of the crime is a question which is not only to be

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stated in the verdict, but which must, like any other fact, be established by the evidence. Therefore, to justify a conviction of murder in the first degree, it must be shown that there was an intent to kill—to show such a state of facts or circumstances as will negative a killing without the deliberate intent or purpose to kill, but which at common law would be murder. At common law, any killing which results from any unlawful act, the probable consequence of which is death, is deemed murder, although the killing was not previously intended, as the cases put by Blackstone of “an unnatural son who exposed his sick father to the air against his will, by reason whereof he died; of the harlot who laid her child under leaves in an orchard, where a kite struck it and killed it; of the parish officers who shifted a child from parish to parish till it died for want of care and sustenance.”

And so if a man throw a heavy body from the roof of a building into a crowded street, by means of which a person is killed, it is murder, though there was no intent to kill.

But in none of these cases would the homicide be murder in the first degree under our statute, because of the absence of the deliberate intent to kill. To warrant a conviction, therefore, of murder in the first degree (where it is not committed in the perpetration or attempt to perpetrate robbery, etc.) the evidence must be such as to negative any presumption of a killing without a deliberate intent to do so; or rather a deliberate intent or purpose to kill must be proven by the prosecution. (Wharton's Criminal Law, 1083.)

The statute declares that only willful, deliberate and premeditated killing, or that which is perpetrated by means of poison, lying in wait or torture, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery or burglary, shall be murder in the first degree; that all other kinds of murder shall be deemed murder in the second degree. To convict of murder in the first degree it is therefore as necessary for the prosecution to show in a case of this kind that the killing was willful, deliberate and premeditated, as it is to establish any other fact. And it must not only be proven, but it must be established beyond a reasonable doubt. If there be a reasonable doubt whether such deliberate

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intent to kill existed, the prisoner should have the advantage of the doubt and the jury should find him guilty of the lower grade of the crime. This reasonable doubt is as available to reduce the degree of the offense as to acquit entirely. (1 Wharton's American Criminal Law, 710 ; Id. 944.)

It may be said that the killing being shown, the law would presume it to be murder. Such is the presumption, but it is not presumed to be murder in the first degree. The mere homicide, independent of the manner of the killing, would doubtless only raise the presumption of murder in the second degree. As murder may be committed in innumerable ways, without the deliberate and premeditated intent to kill, the mere fact of the killing should not raise the presumption that such deliberate intent to kill existed. It has been held in Virginia and Ohio, that where the homicide is proven the presumption is that it is murder in the second degree. That if the prosecutor would make it murder in the first degree, he must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter the burden of proof is on him. (1 Wharton Criminal Law, 1111.) The deliberate and premeditated attempt to kill, which the statute makes a necessary ingredient of this crime, can it seems to me only be ascertained in one of two ways—either by the express declarations of the prisoner, or from the manner of the killing and the circumstances connected with it. Where the killing is not proven by an eye witness, and the manner of killing is gathered only from the wound or wounds upon the body, it is clear that it would in a majority of cases be very difficult to show, beyond a reasonable doubt, that the homicide was committed with a deliberate intent to kill. If it appeared that the mortal wound was inflicted with an instrument likely to produce death and upon a vital part of the body, that would perhaps be sufficient to warrant a conviction of murder in the first degree ; but it would not by any means be conclusive, because it might have been inflicted in self defense, or upon a sudden quarrel, or in the reckless attempt to inflict some bodily harm, in all of which cases the crime would only be murder in the second degree.

Take the case at bar, what evidence is there that the killing was willful, deliberate and premeditated ? Simply the manner in which

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the life of the deceased was taken, the presumption being that death produced by choking or strangling must have been the result of a deliberate intent to kill; such would be a natural presumption, and one sufficient, perhaps, to justify a conviction of murder in the first degree. Killing produced by such means might have satisfied the jury beyond a reasonable doubt of the premeditated intent to kill, but surely such fact would not conclusively establish it. Is it not possible that a quarrel may have occurred between the defendant and the deceased, and that in the heat of such a quarrel death might have been the result? Had such been the case it would not necessarily be murder in the first degree. Or suppose there had been no quarrel, but the defendant went to the house of the deceased with the intent and purpose of inflicting bodily punishment upon her, and in doing so choked her beyond his purpose. In such case the crime would not be murder in the first degree, because it would not be the result of a deliberate intent to kill. True, the proof in such case might be overwhelming and convincing that such was the intent. Admitting it to be so, yet as it is a fact to be determined by the jury, and of the existence of which they are to be satisfied beyond a reasonable doubt, and upon which it is possible they may have such doubt, the Judge transcends his power when he tells them that such fact is established by the evidence, as was virtually done in this case. To give it as his opinion to the jury that the defendant was either guilty of murder in the first degree or innocent, was simply saying that the evidence established the homicide to have been a willful, deliberate and premeditated killing, which was a fact incumbent upon the prosecution to establish, and which could only be determined by weighing all the testimony in the case. Had the Judge below told the jury that the evidence fully showed that the defendant committed the crime, it would hardly be claimed that it would not be a violation of the Constitution. That it would not be "charging as to matters of fact," and yet the deliberate intent to kill, is a fact as necessary to be proven by the prosecution as the proof that the defendant occasioned the death of deceased. How was the fact that a conviction of murder in the second degree was not justified by the evidence to be ascertained? Only by assum-

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ing that the deliberate and premeditated intent to kill was proven beyond a reasonable doubt. The jury might possibly have had some doubts upon that question. They may have been well satisfied that the defendant took the life of the deceased, and being satisfied of that, the law justified them in the presumption that the homicide was murder; but they may not have been satisfied beyond a reasonable doubt that the killing was the result of a deliberate and premeditated intent or design to take life, and if they were not they should have found him guilty of the higher degree. Thus the Judge not only charged the jury as to a matter of fact, but assumed and gave it as his opinion that such fact was proven beyond a reasonable doubt, whilst the jury might have drawn a different conclusion from the evidence.

Had the homicide in this case been committed by means of poison, or in the perpetration or attempt to perpetrate arson, rape, robbery or burglary, possibly it would not be deemed error in the Court to say to the jury that they could only find defendant guilty of murder in the first degree or acquit him, because the law absolutely makes all homicide committed in that manner murder in the first degree; and when the prosecution establishes the fact that it was committed in any of these ways, the burden of reducing the crime devolves upon defendant if such thing were possible. If for example it was shown by the prosecution that the killing was committed by means of poison, and there was no attempt to show a killing by any other means, the Court might say that there was no evidence to reduce the crime to murder in the second degree, without, perhaps, violating the constitutional provisions. At least, it has been held in California upon a Constitution similar to ours, that when the killing is proven, and there is no attempt upon the part of the prisoner to reduce the offense to manslaughter, it is not error for the Court to instruct the jury that they are not to consider the question of manslaughter. That would, however, be a very different case from this. In that case the Court simply tells the jury that the defendant has introduced no evidence to reduce an act, which in contemplation of law is murder, to manslaughter, the burden of proving which is always thrown upon the defendant after the homicide is established by the prosecution. Under its right

to state the evidence, the Court might perhaps say that there was no evidence to establish a certain fact, if such were indeed the case. I do not, however, say that even that might not possibly be considered error. But in this case, the Court tells the jury that a fact, which it was the duty of the prosecution to establish beyond a reasonable doubt, was so established. That is giving an opinion upon the weight and sufficiency of evidence, not a statement that there is no evidence to establish a fact. It is not charged in the indictment, nor is it claimed by counsel, that the murder in this case was committed by means of poison or in the perpetration of, or attempt to perpetrate arson, rape, or robbery; and as there is no proof that it was so committed, the degree rested solely upon the question whether it was proven beyond a reasonable doubt that the homicide was the result of a deliberate and premeditated intent to kill. Whether it was or not, the jury were the exclusive judges, and therefore the Court erred in giving the instruction set out above.

The other instruction, which in my opinion is open to the same objections, reads as follows:

“The testimony in this case tends to show the property of the deceased, or some portion of the same, in the possession of the defendant at a time subsequent to the alleged murder, and at quite a recent date.” * * *

This instruction assumes that the property found in the possession of the defendant was the property of the deceased. That was a question upon the establishment of which alone the defendant could have been convicted. It will be observed that the Court does not say that the evidence tended to show that the property found in the possession of the defendant belonged to the deceased; but assuming that the property did belong to the deceased, the Court says the evidence tends to show simply one fact—i. e., that it was in the defendant's possession subsequent to the murder. Whether the property found in possession of the defendant belonged to the deceased, was a question of fact to be ascertained by the jury. However, as the first instruction discussed is in my opinion sufficient to reverse the judgment in this case, I do not deem it necessary to give this any further consideration.

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As the swift and certain administration of criminal justice is the surest preventive of crime, and the strongest guarantee of public order, any circumstance which has a tendency to delay or defeat it is greatly to be regretted. But however deeply we may deplore any such circumstance, it is the first and paramount duty of the citizen to respect, and of the Court to vindicate, the law. It should not be forgotten that even to the most abandoned and reckless felon, charged with the most heinous and most revolting crime, the law guarantees rights which no man has a right to take from him; which no Court can conscientiously disregard. Though the proof of his crime be overwhelming and conclusive—though there be nothing to mitigate his crime, no circumstance to plead for mercy, no legal technicality to obstruct the keen point of the sword of justice—yet it is only upon a presentment or indictment of a Grand Jury that he can be called upon to answer for his crime; he can only be found guilty by the verdict of an impartial jury, and executed or punished only upon a regular judgment of a Court having complete jurisdiction; in other words, the criminal has a right to claim that justice shall only be meted out to him in exact accordance with the strict and inflexible rules of law. It is his right to have the law governing his case clearly and correctly expounded to the jury; notwithstanding the proof of his guilt may be perfectly conclusive, yet any material error in so stating the law entitles him to a new trial. That may not be a good rule, but *ita lex scripta est*.

The law, in its humanity, presumes every man innocent until his guilt is established according to the rules adopted for that purpose. Until his guilt is so established, therefore, the strong arm of the law shields and protects him as it does the most pure and upright citizen in the community.

In my judgment a new trial should be awarded.

RESPONSE TO PETITION FOR REHEARING.

Opinion by BEATTY, C. J., JOHNSON, J., concurring.

A petition for a rehearing has been filed in this case, and three points are relied on in that petition. Those points are as follows:

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1st. That this Court erred in sustaining one of the instructions given by the Judge in the Court below.

2d. That the indictment was bad because, when our Constitution was adopted requiring that "No man shall be prosecuted for a capital or otherwise infamous crime, except upon indictment or presentment," etc., the word indictment was used in its common law signification, and meant what it meant at common law and not what it might be made to mean by subsequent enactment.

3d. That the examination of D. Black showed that he was not a competent juror, and not capable of rendering an impartial verdict.

We will examine the objections in their reversed order. With regard to the third point, it was fully discussed both in oral argument and the written brief of appellant's counsel. The objection was carefully examined by this Court, and we were unanimously of the opinion the juror was not disqualified, and we see no reason to change that opinion. No new light is thrown on the subject.

The second point was argued with great ability by counsel on the first hearing of this case. His brief was certainly very full on this point, and we read with great care and attention the arguments of Mr. Bishop as to the necessity of an indictment for murder drawing the distinction between murder of the first and second degree. We examined all the authorities cited by counsel, with many others not referred to; and after a very careful examination of this point, the Court was satisfied of the sufficiency of the indictment under our statute upon the subject.

The counsel, in his petition for rehearing, presents no new argument on this point. He perhaps lays more stress now than he did in his first argument, upon the proposition that the word indictment, as used in our State Constitution, must be understood to have meant an indictment as that word is understood at common law. This view of the case was under consideration, but on mature reflection we could not come to the conclusion that appellant's counsel seems to think should have been arrived at. When the Constitution of the United States was adopted, it only required a person before being put on his trial for a capital, or other infamous crime, to be presented or indicted, showing that the formality of an indictment might be dispensed with if the grand jury acted by presentment.

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In other words, that it was only necessary that the grand jury, in some form, should sanction the proceeding before a party should be put on his trial.

If it was meant to require a common law indictment, what was such an indictment? Before the Norman conquest, I am not certain what language was used in law proceedings, probably either Latin or Anglo Saxon, in most parts of England; in other parts, probably either the Danish or Welsh language. After the conquest of England by the Normans, all legal proceedings were either in Norman, French, or Latin. The older forms of indictment with which we have any particular acquaintance under the common law system were in Latin. But the Latin forms had been abolished in England before we adopted our Federal Constitution. Certainly it was not the intention of the Convention who formed our Constitution to reintroduce the obsolete Latin form of indictment. If they did not intend to reëstablish the old Latin form, how are we to know that it was the intention to require any particular form for our indictment. Even if the framers of that instrument had used the single term indictment, without connecting the other and more latitudinous term presented with it, would it not be more rational to conclude they only meant that, before a party was put on his trial for a certain class of offenses, a "grand jury legally convoked," should upon their oaths prefer a written charge against him, stating the nature of the acts done and the crime of which he was accused, leaving the form of that charge and the language in which it was to be stated to be regulated by law, as it heretofore had often been. That this was their intention, is we think, clearly shown by the use of the word presentment in connection with the term indictment.

That this was the view taken by the framers of our own Constitution there is less reason to doubt. We have copied most of our Constitution and most of our laws from the sister State of California. Long before the adoption of our Constitution that State had passed laws simplifying, shortening and omitting many of the more formal parts of the old fashioned indictments. These more simple and less formal indictments had often been sustained by the Courts of California, and also by the Territorial Courts of Nevada. It could not

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have been the intention of the framers of our Constitution to compel this State to go back to the old and almost obsolete form of the common law indictments.

We see no reason for changing the views we first expressed on this point.

The remaining point in the petition for a rehearing which we deem it necessary to notice, is in regard to one of the instructions complained of. That instruction is in the following language: "The distinction between murder of the first or second degree is quite nice. I will briefly state such distinction, although from the testimony I apprehend that you may conclude that the defendant was either guilty of murder of the first degree, or innocent."

The complaint is that the jury were instructed as to matters of fact, when the Constitution provides that they alone shall be the judges of fact; in other words, that the Court usurped the province of the jury in expressing an opinion as to matters of fact. Whilst judges are prohibited from charging juries in respect to matters of fact, they are authorized to "state the testimony." It may be doubtful as to what is the exact meaning of this latter expression. It was hardly intended to confine the Judge, in stating the testimony, to a parrot-like repetition of what the witnesses said. For such a purpose the wisest Judge would be less competent than a good phonographic reporter. It must surely have been intended to allow the Judge some latitude in commenting on the testimony he was stating. If not, it was foolish to say he should state it. If the Judge may comment on the testimony given, what character of limitation will you place on those comments? That he may weigh the evidence and comment on it, point out the discrepancies in the testimony on either side, show where one piece of evidence corroborates another, or where the testimony of two or more witnesses contradict or conflict with one another, is generally admitted. As we stated in our former opinion, it is admitted that the Judge may in many cases determine that there is no evidence to support a given proposition.

On this ground nonsuits are granted in civil cases, and juries directed or advised to acquit in criminal cases. It has certainly been held in some cases that the opinion of the Court expressed as

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to the weight or sufficiency of evidence on any given point was not error. On the other hand, it has been held that it would be error where there was any conflict of evidence for the Court to say to the jury that a certain fact was or was not proved. But there is a great difference in the two propositions. In the first the Judge only gives his opinion and advice, still leaving the jury perfectly free to find the fact as they think right, only giving to the advice and opinion of the Judge such weight as it is entitled to. In the other they are imperatively commanded to find a fact in a certain way, or in making up their verdict to consider that particular fact as fully established.

The case of *The Commonwealth v. Child*, 10 Pick. 252, establishes the first proposition. The case cited by Mr. Justice Lewis in his opinion in this case from 3 A. K. Marshall, is one wherein the Court below was asked to instruct the jury positively that a certain fact had not been proved, when in fact certain evidence had been given tending to show that fact. The Court refused to give the instruction, and the appellate Court held the ruling correct. But that Court in expressing their views of the law use language going far beyond the case before them. They go farther and say the Court should not even express an opinion in regard to a fact where there is a conflict of evidence. But where an opinion goes beyond the case before the Court it amounts to a mere *dictum*. So far as this case goes it only establishes the second proposition we have stated, which is not necessarily in conflict with the Massachusetts case. The *dictum* (which is probably the mere result of carelessness) certainly is in conflict with the case in 10 Pick.

In the case of the *People v. Ybarra*, 17 Cal. 166, the defendant was indicted for the murder of a woman. There was evidence, and among other things the dying declarations of the murdered woman, that she was murdered by Pedro, a man with whom she had been living. But the defendant who was on trial was not arrested until the lapse of a considerable period after the offense committed, and his main reliance before the jury was that he was not the Pedro who had lived with the woman. In other words, there was a question as to the identity of the defendant, whether he was the Pedro Ybarra who had formerly lived with the murdered woman, or was

a different man unfortunately bearing the same christian name, (Pedro) and a close personal resemblance to the former companion of the murdered woman. These facts do not distinctly appear in the reported case, though it is clear from the opinion of the Court that some question of this kind was raised in the case. The writer of this opinion having been of counsel, recollects the main features of the case distinctly. A witness in that case gave in evidence the dying declaration of deceased, and swore that he recognized the defendant as the Pedro with whom deceased had lived, and of whom she spoke in her dying declarations. The Court instructed the jury that if they believed the dying declarations of deceased were true they must convict the defendant. This took from the jury the right to exercise any judgment as to the sufficiency of the proof as to the identity of the prisoner with the other Pedro. Of course this was wrong under all rules. This does not conflict with the Massachusetts case.

Some general rules seem to be tolerably well established as to how far a Judge may go commenting on evidence and giving his opinion thereon. The general result seems to be, that a Judge may express his opinion on the weight or sufficiency of evidence if he is careful to inform the jury distinctly, that whilst he as Judge may comment on the evidence and give his opinion as to its effect and sufficiency to prove any given fact, yet they are the ultimate judges of the fact, and may find according to their own views of its sufficiency, even though it be contrary to the opinion of the Court. This view of the law is sustained by a multitude of authorities, and perhaps none is more directly in point than the case of the *N. Y. Fire Insurance Co. v. Walden*, 12 John. 513. Those wishing to further investigate this subject will find many cases cited by Graham & Waterman, in their work on New Trials, vol. 1st, 310 *et seq.*, and also at page 825 *et seq.*, in vol. 3d (the paging of volumes two and three being continuous). There are some *dicta* to the effect that a Judge ought not to express his opinion about matters of fact in the presence of the jury, and Graham & Waterman, whilst admitting that the rulings have been to the contrary, seem to think that Judges in this democratic country ought not to trespass on the province of the jury by expressing an opinion on matters of fact.

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We cannot find a single case where a new trial has been granted because of a mere expression of opinion of a Judge, unless in cases where the Appellate Court has held the Judge was clearly wrong in the opinion expressed. There the case has been reversed, not merely because of an expression of opinion, but because the jury seemed to have been misled by a wrong opinion, for if the jury found according to the force of the evidence, notwithstanding the bad instruction, the case would not be reversed by the Appellate Court.

Here it is complained the Judge intimated an opinion that the jury ought not to convict of murder in the second degree. Was not this intimation clearly correct? There was no testimony tending in the slightest degree to convict the prisoner of any such offense. It is urged by counsel that it might be true that the prisoner killed the deceased, yet was not guilty of murder in the first degree; that he may have killed her upon some sudden quarrel and afterwards perpetrated the robbery. That is possible, but there is no testimony tending to prove it, nor is there any evidence adduced on the trial showing a reasonable probability that such may have been the case. The killing was by choking. To kill in this way requires time and a continuous exertion which at best strongly tends to negative the idea that it was done in a sudden heat of passion, or that it was the unexpected result of what was only intended to be chastisement, or injury of a character not expected to produce death. Again: the robbery followed the death of the woman almost immediately, for she was alive late at night and in the morning she was found dead and the goods were gone. Judging by experience of the conduct and actions of other criminals in similar circumstances, we can hardly conceive that if the murder had been the result of hot blood or accident, the murderer would have had the hardihood to remain in the house long enough to rob it. He would have fled to conceal his guilt, or have given himself up to some officer, trusting by a prompt surrender and statement of his own case to palliate or excuse the crime. We apprehend that the deliberation required to effect the robbery must have been the result of a well matured plan either to murder and rob, or at least to plunder the house, and to murder if necessary in carrying out the main object.

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We can see no evidence in the case upon which the jury might have found the prisoner guilty of murder in the second degree. Had they so found, we would have been forced to the conclusion that the jury had either compromised with some obstinate member, compromised with their own conscience, (being doubtful of the guilt of the prisoner) or else, taking the law-making power into their own hands, said this man shall be only imprisoned, although the law declares that for such an offense death shall be the penalty.

The rehearing is denied.

WILLIAM T. O'NEALE, RESPONDENT, v. A. C. CLEAVELAND, APPELLANT.

"Occupant" and "party in possession" as used by the Legislature in the Act in regard to the "Selection and Sale of Lands, etc.," are not strictly synonymous. Occupant means one dwelling upon and occupying a part of a tract of land; it does not necessarily imply that the party is in possession of the whole.

Section 11 in this Act if construed by itself would be held to confer a preferred privilege on the occupant to purchase the entire sixteenth or thirty-sixth section upon which he might have an occupancy; but taken in connection with other sections it is clear that the Legislature only intended to give this preferred right to the extent of either one hundred and sixty or three hundred and twenty acres. Lands selected in lieu of sixteenth and thirty-sixth sections are to be disposed of in accordance with the provisions of Sections 12 and 21 of this Act.

The twelfth section was intended by the Legislature to give a preferred right to the actual occupant. But the extent of that preferred right not being shown in Section 12, we have to resort to Section 11 and other portions of the Act to ascertain the extent or quantity of land to be affected by this preferred right. That quantity cannot be less than one hundred and sixty acres.

Section 12 gave first a preferred right to the actual occupant; next, if no claim was asserted by an actual occupant, then to any person who had applied to locate a land warrant, on land selected in lieu of the sixteenth and thirty-sixth sections. This view of the twelfth section is confirmed by an examination of the provisions of the twenty-first section.

Section 21 taken in connection with other portions of the Act indicates: First, that an occupant shall have a preferred right of purchase over all other persons; second, that right shall be limited in quantity to one hundred and sixty or three hundred and twenty acres; third, actual occupancy of any portion of the section would give a preferred right to at least one hundred and sixty if not to three hundred and twenty acres; fourth, the purchase should be within the time limited to other preferred purchasers.

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Persons who became occupants (before selection) of land afterwards selected in lieu of sixteenth or thirty-sixth sections, are entitled at their option to buy the same at one dollar twenty-five cents per acre, although they may have previously purchased a land warrant to locate the same lands.

When there is a statement on motion for a new trial, there need be none on appeal. The seventh section of the land Act which provides for taking testimony before a Commissioner, was not intended to prohibit the Judge hearing such testimony when convenient to himself and preferable to the parties.

Stipulations in regard to taking testimony should be interpreted liberally, to carry out the obvious intention of the parties, and in such way as not to defeat the ends of justice.

THIS was an appeal from the District Court of the Third Judicial District, Washoe County, Hon. C. N. HARRIS, presiding.

The facts are fully stated in the opinion of the Court.

R. M. Clark, for Appellant, made the following points :

Land could not be located prior to April 2d, 1867. (Act 1865, p. 174, Secs. 4-5. Act 1866, p. 194, Secs. 3-4.)

Under the Act of 1867, Section 12, the parties have equal rights before the law. *Neither can in this particular be preferred.* (Act 1867, p. 165, Sec. 12.) Act not retrospective. (*Milliken v. Sloat*, 1 Nev. 577, 578.)

The land in question was "claimed under State law," and is therefore not liable to be located with scrip, *except by actual occupant or person in possession.* (Sec. 12, Act 1867.)

What did the Legislature mean by use of terms "occupant," "possession," etc.? (23 Cal. 442; 25 Id. 131 to 135; 31 Id. 418; 10 Peters, 189.)

Cleaveland being in possession has preferred right under Act of 1867. (Secs. 7, 12, 21.)

Two classes of preferred rights not inconsistent.

Cleaveland being in possession of a *part* and claiming *title* thereto must be permitted to hold that part, and the judgment must be reversed.

This case is clearly appealable. (Land law 1867, Sec. 7, p. 167; Const. State, Art. VI, Sec. 4.)

The term "*under any law of this State*" cannot be restricted to statutory law. (Sec. 12, Act 1867, p. 169.)

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Cleaveland having purchased a School Land Warrant is not for that reason deprived of the benefits of Section 21, Act 1867, p. 1.

The land is not subject to preëmption. (Lester's Land Law, p. 62.)

The objection to taking of proof before Judge is not well taken, and if it were could not be taken advantage of by O'Neale.

George A. Nourse, for Respondent.

This Court cannot look beyond the judgment roll in this action, for the reason that no grounds of error are assigned or stated by appellant in his statement on appeal. (Laws of Nevada, 1861, p. 362, Sec. 276; *Barrett v. Tewksbury*, 15 Cal. 354; *Hutton v. Reed*, 25 Id. 478, 485-6, emphatically affirming former case. See also for purpose of comparing statutes, Cal. Practice Act, Sec. 338; *Burnett v. Pacheco*, 27 Cal. 411; *Wixon v. B. R. & A. Water & Min. Co.*, 24 Cal. 367.)

Nor does the stipulation that "the notice of application for a new trial shall be considered the assignment of errors and grounds on motion for new trial" constitute such a "statement of the grounds on which he intended to rely," as our Statute requires. They are vague, indefinite, and uncertain, and do not direct the Court in any degree to the grounds of error specifically relied upon.

Under Section 7 no testimony could be taken in Court. That section confines the testimony to such as is offered before the Commissioners. The agreement *assuming* the right to take testimony before the Judge conferred no new right. If the right already existed (and we contend it did not) to take testimony before the Court, then it was reserved; but if no such right legally existed, then surely none was created by this agreement.

When O'Neale and Cleaveland made their application to locate with land warrants, there was no law authorizing such location, and neither at the time derived any advantage from the offer. The subsequent act, however, must be held to take effect by relation *nunc pro tunc*, so as to effectuate each offer as of the date when made, and so give effect to the prior offer of O'Neale.

After the passage of the subsequent law, O'Neale showed the greater diligence: he was the first to apply for its benefit. But if

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the evidence be held properly admitted by the Judge who tried the case, even then the appellant has no case, for Section 12 of the Land law of this State gives to him who had, previous to the passage of the law, sought to locate a land warrant upon selected lands, a right "*prior*" to any other, except such as existed under some law of the State previously passed.

The appellant fails entirely to show himself previously "an occupant or party in possession," (Sec. 6) or "an actual occupant," (Sec. 11) and to prove that he had "a prior title or claim thereto under any law of this State" (Sec. 12).

Nor has he any claim under Section 21, for the record shows that he had, prior to the passage of the Act, purchased land warrants for the land in question.

The only question for discussion in this case is really that of the occupancy of the premises by plaintiff.

The other questions need no discussion.

The proof upon this point fully sustains the findings to the effect that (see eighth finding) "Cleveland never defined nor attempted to mark by metes or bounds the extent of the tract of land to which he herein asserts a claim." There is not in the case one word of testimony to show that he ever attempted to mark out his claim.

Now the terms "occupancy" and "actual possession" used in the law had a well-settled legal meaning when this statute was passed. In the case of agricultural land, no person was deemed to be in possession, so as to sustain an action or maintain a defense in ejectment based upon possession, unless he fenced in his claim with all convenient dispatch, there being no survey made by the County Surveyor.

This is *timber* land—so found by the Court, and so testified to by all the witnesses—"valuable only for the pine wood and timber thereon growing."

The Courts have never required that timber land should be *inclosed*, for "the law does not require a vain thing."

As a dwelling and inclosure of the land claimed is necessary to show occupation or possession of land claimed as a ranch, so a distinct marking out of the boundaries of the land claimed has always been deemed necessary to constitute possession of timber land. (*McFarland v. Culbertson*, 2 Nev. 282.)

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In all cases a *pedis possessio* must be shown. (*Sankey v. Noyes*, 1 Nev. 72.)

The reason of the rule is very distinctly recognized, as applied to mining claims, in *English v. Johnson*, 17 Cal. 116-7-8. Now an "actual occupant" must have performed acts of possession still more efficient and notorious than are needed to constitute mere legal possession. (*Minturn v. Burr*, 16 Cal. 109.)

On general subject of possession of lands, and what constitutes it, see *Plume v. Seward*, 4 Cal. 94; *Murphy v. Wallingford*, 6 Id. 648; *Wilson v. Corbier*, 13 Id. 167; *Preston v. Kehoe*, 15 Id. 318; *Havins v. Dale*, 18 Id. 368.

To show any one in possession of any land, it has (as the foregoing cases show) always been held in this State and California, that he must be proved to exercise actual dominion over the premises for the purposes for which it is valuable.

Ellis & Sawyer, on the same side.

Section 6 of the Act is in regard to a different class of lands from this in controversy. The only sections of the Act applying to this class of lands are Sections 12 and 21.

If Cleaveland was in possession of the land in controversy, and had not purchased a land warrant therefor, he was entitled to buy at a price to be fixed by the Board of Regents. He was not entitled to pay for the land with a land warrant. Nor under this section has he any preferred right. It is a simple right to buy in a certain way, and if another makes a prior proposal to purchase under some other provision of the Act, the latter would have the advantage of the first offer.

Cleaveland can only rely on Section 12 for a preferred right, and under that Section O'Neale has a preferred right antedating his right.

Opinion by BEATTY, C. J., LEWIS, J., and JOHNSON, J., concurring specially.

This is a contest under the provisions of an Act entitled "An Act to provide for the Selection and Sale of Lands granted by the United States to the State of Nevada," approved April 2d, 1867.

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The question to be determined is, whether O'Neale or Cleaveland shall have the preferred right to purchase a certain quarter section of land.

The facts appear to be, that in the winter or spring of 1866, Cleaveland built a cabin on the quarter section of land in controversy, repaired an old inclosure containing something like an acre of ground, and cultivated the same as a garden, and occasionally slept in the cabin. Whilst thus occupying, or claiming to occupy, this cabin and garden, he applied to the United States Land Office to preëempt this quarter section. This application was refused, on the ground that he did not establish the necessary acts to entitle him to a preëmption right. In November or December of the same year, and after his preëmption claim had been rejected, he proceeded to build a better house on the same premises. This house was finished about the seventeenth of December, 1866, and immediately after it was finished Cleaveland moved into it, and has continued to reside there ever since.

On the seventh day of December, 1866, the then Superintendent of Public Instruction for the State of Nevada, applied to have this land selected by the State in lieu of the sixteenth and thirty-sixth sections, which had been lost to the State by reason of preëmption claims thereon.

On the tenth day of December, 1866, O'Neale applied to locate a land warrant on this quarter section. The Surveyor General refused to recognize this application, on the ground that the law, as then existing, did not authorize the location of school-land warrants on land selected in lieu of the sixteenth and thirty-sixth sections, theretofore claimed by and allowed to preëmtors.

Subsequently in March 1867, Cleaveland made a similar application, which was disposed of in the same way.

On the second of April, 1867, our present law was passed in regard to the location of sixteenth and thirty-sixth sections of land, and also of lands selected in lieu of sixteenth and thirty-sixth sections.

On the fourth of April, two days after the passage of the law, O'Neale applied a second time to locate his land warrant on this quarter section. On the twelfth day of April (eight days later)

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Cleaveland also renewed his application either to locate his land warrant on this quarter or to be allowed to pay for the same.

Under the provisions of the statute the controversy was referred to the District Court of the county where the land was situated. That Court held that O'Neale had the preferred right to purchase, and Cleaveland appeals.

The rights of the parties depend on the construction to be given to the Act of the second of April, 1867. This Act is full of repetitions, and is as ambiguous and confused in its phraseology as an Act could well be. Yet, taking the whole Act together, it appears not very difficult to arrive at the intention of the Legislature.

It must be borne in mind that the Act of 1864-5 authorized the sale of floating land warrants, and the location of these warrants by the purchasers upon any of the subdivisions of Sections 16 or 36, reserving to those who had improvements on, occupation of, or possession of any part of such sections, a preëmption right to the extent of 160 acres.

This law was amended in 1866 so as to confine the preëmption right to those persons who had complied with the possessory laws of the State.

By the law of 1866 provision was also made for the selection of other lands in lieu of such sixteenth and thirty-sixth sections as had been previously claimed by preëmptors. But this law made no provision for the sale of these selected lands nor the location of land warrants on them. It is clear, then, the application both of O'Neale and Cleaveland to locate their warrants on the land in controversy made in December 1866, and March 1867, were perfectly idle ceremonies. Neither derived any rights thereunder.

The Act of April 2d, 1866, provides for the selection of lands granted by the various Acts of Congress to the State of Nevada. Section 6 of that Act directs the sale of the lands thus to be selected to the highest bidder, but provides that an occupant or party in possession shall have a preferred right to purchase one hundred and sixty acres at the minimum price of one dollar and a quarter per acre.

Section 11 is in this language: "The actual occupant who has made improvements on any portion of Sections 16 and 36,

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prior to the passage of this Act, shall have the preferred right for six months after the passage of this Act to purchase the same, after which time the same shall (if not previously entered or purchased by such actual settler) be subject to entry by any person desiring the same ; *provided*, that parties settled and residing upon either a sixteenth or thirty-sixth section, before survey, shall have six months after such survey is made in which to purchase."

We will examine some of the phrases in the sixth and eleventh sections before going further. The first question is, did the Legislature, in using the phrase occupant or party in possession, use occupant and the latter part of the phrase as strictly synonymous terms, or does occupant mean something different from a party in possession. We think the phrases are not strictly synonymous.

There is a law of the United States allowing occupants who possess certain qualifications, and who have made a certain character of improvements, to preëempt a quarter section of United States land. Occupant, as used in that law, means a person who is living upon the quarter to be preëmpted, but does not necessarily mean one who is in possession of the entire quarter. Under that law the person living upon a quarter section and possessing the other necessary qualifications of a preëmtor, and having made the necessary improvements, is entitled to preëempt the entire quarter, although he may not be in actual possession of one-tenth part thereof.

There are cases in which the preëmtor, to include his improvements, is allowed to go off of the quarter on which he lives and take other forty-acre tracts to make up his quantity. But these are exceptional cases. The general rule is that the occupant (that is, the dweller upon) is entitled to preëempt the quarter upon which he resides. We think then that the Legislature, in using the word "occupant" in the sixth section of the Act, used it in the popular sense, and indicated the intention to allow those who dwelt upon a quarter section of land to preëempt the same, whether in possession of the whole or only a part thereof. This section refers to a different class of lands from that in dispute, and we have only referred to this section to try and ascertain the general intent of the Legislature and the scope of the law.

If we were called on to interpret the eleventh section standing alone, we would say that it gave the right to the occupant (that is to a person actually living upon a sixteenth or thirty-sixth section) to preëempt the entire section upon which he was living. "To purchase the same," as it stands in this section, according to the ordinary rules of language, may refer to either one of three things: first, "his improvements;" second, "any portion of sections sixteen and thirty-six on which his improvements are located;" or third, "the entire section on which he has made improvements." It will hardly be contended that the Legislature intended to limit the occupant to the purchase of his own improvements, to wit: houses, mills, etc., without the right to purchase any part of the land. Before the title passed from the Government, the occupant could remove his improvements without buying. The right to buy any portion of the land on which his improvements are situated, would if literally carried out, only entitle a party who had built a valuable house or mill to buy so much of the soil as was covered by his structure. This would certainly be but a poor privilege. A house or mill with only the soil on which it stands, would be next to worthless. To give, however, to a party the right to purchase six hundred and forty acres of land where he had built a mill or house on any portion of that six hundred and forty acres, would not in this country, where land is so abundant and so little of it occupied, appear to be unreasonable. Grammatically the word "same" may as well in this sentence refer to the whole section of land as to the improvements, or as to the particular part of the land covered by improvements. And such we should clearly hold to have been the meaning of the Legislature but for other sections of the Act. Section 6 clearly limits the right of preëemption at minimum price, in lands selected under that section, to one hundred and sixty acres. Section 7 limits the right of purchase by one person, under this Act, to three hundred and twenty acres. In other words, no person, whether a preferred or ordinary purchaser, can buy more than three hundred and twenty acres, and a preferred purchaser (at least so far as the lands selected after the passage of this Act are concerned) can buy no more than one hundred and sixty at the minimum price.

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Taking Section 11 then in connection with the other sections, and considering the general objects of the Act, we are satisfied that the Legislature by that section did not intend to limit the preferred right of occupants either to the purchase of their own improvements or of the very land on which such improvements were erected. Nor, on the other hand, did the Legislature intend to give the preferred right of purchase to the entire section. But that right was intended to extend either to the purchase of a quarter section or a half section, including the improvements. To determine whether a party having made improvements on a sixteenth or thirty-sixth section is entitled to a preferred right to purchase a quarter or a half section, is a question of much difficulty, and in this case need not be determined, as only a quarter section is claimed.

Sections 12 and 21 of the Act of 1867 are in the following words:

“SEC. 12. Lands selected prior to the passage of this Act, in lieu of the sixteenth and thirty-sixth sections, shall be sold as the sixteenth and thirty-sixth sections; *provided*, that where any person shall have applied to locate school land warrants upon such lands, such person shall have a prior right for thirty days after the passage of the [this] Act, to locate such warrants upon the land he may have applied to make such location upon, in case there be no prior title or claim thereto, under any law of this State.

“SEC. 21. Any person or persons in possession of lands heretofore selected by the State in lieu of the sixteenth and thirty-sixth sections, for which school land warrants have not been purchased by him or them, shall have the privilege of purchasing said lands at such rate per acre as the Board of Regents may determine; *provided*, in cases where persons were in possession of any such lands prior to the time of selection thereof by the State, and waive the right of preëmption in favor of the State, such person may purchase at the rate of one dollar and a quarter per acre.”

The land in controversy here was selected in lieu of the sixteenth and thirty-sixth sections before the passage of this law. The mode of this disposal is provided in the twelfth and twenty-first sections. It is to be sold in the same manner as the sixteenth and thirty-sixth sections; consequently the interpretation which we have put upon the

eleventh section—which is in reference to the sixteenth and thirty-sixth sections—must determine Cleaveland's rights as to this land, unless there is something in the proviso of section twelve which makes an occupant's rights on this land less available than they would be on a sixteenth or thirty-sixth section.

The expression “in case there be no prior title or claim thereto under any law of the State,” at the close of Section 12, is rather ambiguous. A person settled on any part of a quarter or half section of public land certainly has some claim to that land on which his house is situated, if no more; and we are clearly of the opinion that the Legislature intended to protect that occupancy, and give the occupant a preferred right of purchase to some extent. Whilst Section 12 is entirely silent as to what shall be the extent of that preferred right, and Section 11—with which it stands connected—is not very definite; still, taking the whole Act together, we are satisfied not less than one hundred and sixty acres was intended to be thus protected.

This Section 12 seems to have been formed with the view: First, of giving a preferred right to the actual occupant when there was such person, and he chose to assert his right; second, if there was no occupant, or he waived his right, then to give a preferred right (over third parties) to one who before the passage of this Act had applied to locate a land warrant on lands selected in lieu of a sixteenth or thirty-sixth section.

The provisions of Section 21 are confirmatory of the views we have taken of Section 12. This section in its first clause allows persons who were at the passage of the Act in possession of land theretofore selected in lieu of the sixteenth and thirty-sixth sections, and who had not purchased school land warrants, to buy the same at a price to be fixed by the Regents. It will be observed that this clause is as loose as most of the other sections. There is no express declaration that such persons shall have a preferred right to purchase, nor is there any limitation expressed as to the quantity they may purchase, or the time within which they may purchase.

But taking this in connection with other parts of the Act, and it would seem: First, that this right of purchase was to be a preferred one over all other classes of purchasers; second, that the preferred

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right should be limited in quantity either to a quarter or half section; third, that actual occupancy of any portion of a quarter section would give the preëmption right to at least the whole quarter, if not to two quarters; fourth, the purchase should be within the time limited in other cases of preferred purchases.

The proviso in the second clause of section twenty-one must be interpreted in consonance with the interpretation put on the first clause of that section, so far as it concerns the preferred privilege of purchase of the quantity purchaseable and the kind of possession required. We think in cases coming under the proviso in section twenty-one, parties would have the right to purchase at one dollar and a quarter per acre, whether they had or had not purchased land warrants to locate this particular piece of land. When they entered on such lands as are mentioned in section twenty-one, after selection by the State, and bought land warrants (which sold at five dollars an acre) to locate on the land occupied, it might well be said by the State that the lands were voluntarily taken at that price, and the occupant would not be allowed to recede. So if the warrants were not actually bought, the Board of Regents might fix a price. But it seems to have been the clear intent to allow all settlers who went on the land, before it was selected by the State, to buy at one dollar and a quarter per acre. We do not think if a settler, before selection, was driven by his anxiety to secure a title to the purchase of a land warrant at five dollars per acre, he would be forced to use it in the purchase of land coming under this proviso; but he might at his option pay for it in money at one dollar and a quarter per acre.

Giving then to this Act such interpretation as we think best calculated to carry out the intention of the Legislature, and effect the the objects for which it was passed, we think every settler on a quarter section of public land, which after such settlement was selected by the State, should be protected in a preferred right to purchase the quarter on which he was located at the time of such selection.

With these views of the law we come to the conclusion that Cleaveland had a preferred right to purchase the land in controversy, and might pay for the same either with his land warrant, or with money at one dollar and a quarter per acre.

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Before finally disposing of this case, it is perhaps best to notice some points of practice on which questions were raised in this Court.

Respondent objects to looking beyond the judgment roll in this case, because the statement on appeal does not show or state the grounds of error relied on. There is a statement on motion for new trial in the transcript, and that statement does contain the grounds relied on. There is no statement on appeal, and need be none. The statement on motion for new trial is sufficient. (See *Hooper v. Meyer*, 1 Nev. 433.)

Section seven of the Act of 1867 provides in a case of this kind for taking testimony before a Commissioner residing in the neighborhood of the land in dispute. Indeed, it says such Commissioner shall take and report all the testimony of the parties. But we think the common sense construction of this clause is, that the Commissioner shall take all the legal testimony offered before him. We do not think it was intended to prevent the Court or Judge from hearing testimony in cases where he could conveniently do so, and the parties preferred this course.

Here there was a stipulation agreeing upon certain facts in the case, and reserving the right to each party to prove additional facts, if deemed necessary, by witnesses introduced in Court on the trial. Respondent contends that the right in such case to take testimony never existed, and therefore the reservation of that which did not exist amounts to nothing. This is entirely too technical.

To give a liberal and fair construction to this instrument, we should certainly hold that it amounted to written assent on both sides that oral testimony might be introduced on the trial. Such stipulations should always receive a fair and liberal construction, so as to carry out the apparent intentions of the parties and promote fair trials on the merits, rather than a narrow, contracted, technical interpretation, calculated to take parties by surprise and defeat the ends of justice.

There can be no doubt in this case but that this stipulation was entered into for the express purpose of letting in oral testimony before the Court at trial. We will not so interpret it as to defeat its obvious purpose.

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But even if this testimony was rejected the result would be the same. The findings of fact show the judgment should have been for Cleaveland. Even if we were to reject all the oral evidence we could not substitute new findings for those of the Court, consequently we would have to send the case back for a new trial, and then the facts which exist in the case could be properly proved.

The judgment of the Court below is reversed and a new trial is ordered.

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RESPONDENTS.

When A contracts to deliver to B, at his steam-mills, all the wood necessary to run them for a definite time, and C guarantees the payment for the wood thus delivered, in an action against C, the guarantor, it is not sufficient to allege that wood of a certain value was delivered to B, but it must also be alleged that the quantity delivered was used or needed to run the mills; for this is the extent of the guarantor's liability.

When upon the trial of a cause in the Court below it appears that the plaintiff's complaint is so defective as not to state a cause of action, that Court should either grant leave to plaintiff to amend his complaint, or dismiss the action without prejudice. If the judgment in such case should be on the merits, upon the bringing of a new action embarrassing questions might arise as to how far the former judgment would be available as a plea in bar.

New matter in avoidance of a *prima facie* case made out by plaintiff should be specially pleaded, and no proof of such facts can be heard unless specially pleaded.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD RISING, presiding.

The facts are fully stated in the Opinion.

Aldrich & DeLong, for Appellant, filed a brief touching many points that are not decided in this case, it having gone off on the point of the insufficiency of the complaint. The points in their brief which have any relation to the points decided, are as follows:

The alleged release of the fourth May was void for want of a consideration.

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Ruhling & Co. already owed the amount that Horton demanded of them at the time of the alleged settlement and release, and Ruhling & Co. were doing nothing but paying a debt then justly due to Horton. There does not appear to be any consideration whatever for the release. (See Parsons on Contracts, Vol. 1, p. 386; see Consideration.)

But if a release was given, the Court erred in allowing evidence of it under the pleadings.

On page seventy-two, McCullough's testimony, he is asked two questions intended to elicit his statement in regard to this alleged release. They were both objected to by plaintiff as irrelevant and immaterial, and as not admissible under the pleadings.

The objection was overruled, and an exception taken by plaintiff. (Trans. 72, 73.)

Then came the statement of McCullough with reference to the settlement and release. The answer fails to set up any such defense as a release or discharge from the contract.

This was new matter, and matter strictly in avoidance of the contract, and hence should have been specially pleaded; the admission of such testimony, therefore, was error of a material character, and calculated to take the plaintiff by surprise. That it did take the plaintiff by surprise, see Trans. 85, 87.

For what is new matter, we refer the Court to the following cases: *Gaskill v. Moore*, 4 Cal. 233; *Glazier v. Clift*, 10 Id. 304; *Piercy v. Sabin*, Id. 22; *Bridges v. Paige*, 13 Id. 641.

The only remaining position taken by the Court below is, that according to the contract, Ruhling & Co. were only bound to pay for so much wood as was consumed at the mill.

A contract should of course receive a fair interpretation, whether the rights of sureties are involved or not. (8 Kernan, 234; 29 Cal. 299; 30 Id. 344.)

Horton was required to keep a certain supply of wood on hand, not less than fifty cords at any one time.

Of course, it was not expected that Horton should be the judge of the necessities of the mills; in this, of course, he was to be guided by Uznay, or those who had charge of this department of the business of the mills.

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Once delivered, Horton's liability ceased. By a fair construction of the contract, it is to be presumed that the wood was properly ordered and that it was used, unless the contrary be shown by the defendants, themselves—the *onus* being upon them to show that it was not used.

Wood & Hillyer, for Respondents, furnished the following brief on those points of the case decided by the Court. After stating the facts as claimed to have been proved, the respondents proceed :

But it is insisted that we cannot avail ourselves of this state of the facts, for two reasons, namely :

1. There was no consideration for the release.
2. The release is not pleaded.

In answer, we submit that this was not a technical release, but it was an agreement between Horton and Ruhling & Co. that the contract, so far as the guaranty was concerned, should be abandoned. There was an ample consideration to support his agreement. Ruhling & Co. paid to Horton an indebtedness, for which they were only collaterally bound, and in addition to that paid the sum of three hundred and seventy-eight dollars, for which they were not at the time bound at all.

The payment of these sums was the consideration agreed upon and accepted ; and we have already shown that, by the subsequent acts of the plaintiff, the agreement was carried out and the contract was abandoned. Ruhling & Co. agreed upon their part to pay this money, including the three hundred and seventy-eight dollars, although they were not then legally bound ; Horton agreed on his part to give up the guaranty. The agreements were mutual and supported each other. They were carried into effect, and both parties at the time acted accordingly.

As to the second objection, that the release or abandonment was not properly plead, we have only to refer the Court to the pleadings themselves.

The complaint avers that the plaintiff continued to deliver said wood, and the said Uzmay continued to receive the same up to the first day of November, 1864, in accordance with the terms of said agreement.

The answer fully denies that any wood was delivered under the contract subsequent to June 1st, 1864.

It is averred in the answer (pages 13, 14) that the plaintiff delivered no wood whatever to said Uznay in accordance with the terms of said contract, or upon the credit, good faith or responsibility of defendants, subsequent to the first day of June, 1864. And that plaintiff was fully paid for all wood which he delivered upon said contract, and his claim for such wood was fully satisfied and discharged. The Court will bear in mind that this contract is not under seal, and is not therefore subject to the rules governing such instruments. The pleader has evidently sought to set out, and we think under all reasonable rules of construction has succeeded in fully setting forth the fact, that on June 1st, 1864, this contract was abandoned and the guarantors discharged.

But were all the previous averments and denials insufficient, the evidence would have been admissible under the last averment of the answer, which is a complete plea of payment. Under this plea, defendants had a right to show when and how payment as to them was made. A plea of payment is not new matter. (*Frisch v. Caler*, 21 Cal. 71.)

3. The complaint does not state facts sufficient to constitute a cause of action. This point is fully discussed in the opinion of the District Judge, and we can add nothing to the exhaustive argument of it.

Opinion by LEWIS, J., BEATTY, C. J., and JOHNSON, J., concurring.

The plaintiff brings this action to recover the sum of forty-two hundred and fifty-eight dollars, the value of a quantity of wood delivered to the defendant Uznay under the following contracts :

"This agreement, made and entered into this twenty-sixth day of January, A.D. 1864, between F. B. Horton of the first part, and Charles Uznay, party of the second part, witnesseth : That for and in consideration of one dollar paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged and the premises hereinafter stated, the party of the first part agrees to furnish to the Phoenix Mills all the wood needed for both mills,

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i.e., number one and number two, on the following terms, namely: Until the first day of May, 1864, at fourteen (\$14) dollars per cord for wood without bark, and fifteen (\$15) for wood with bark in a dry state; and from the first of May, 1864, until the first day of November at thirteen (\$13) dollars per cord for wood without bark, and fourteen (\$14) dollars per cord for wood with bark, but in a dry state, and to keep constantly on hand at the said mills not less than fifty (\$50) cords at any one time. And the party of the second part agrees to pay for all the wood used at the above mills at the rates above specified, on the first and fifteenth day of each month for each and every cord consumed. And it is further agreed between the parties that should coal be offered for sale in the market, and should the party of the second part conclude to use coal instead of wood at the mills aforesaid, the party of the second part shall for such cause have the option of canceling this contract; but should the supply of coal be limited, and the mills be obliged to use wood to any extent, then the party of the first part agrees to furnish all the wood needed at both mills, as hereinbefore specified. Should said F. B. Horton fail to carry out this contract, he agrees to pay damages for his failure, liquidated and agreed on between both parties to this contract at one hundred (\$100) dollars per day for each and every day that the mills are stopped on account of not being supplied as per this agreement.

“F. B. HORTON,

“CHAS. UZNAY.

“Witness: H. V. S. McCULLOUGH.”

“Virginia City, January 26, 1864.

“For and in consideration of one dollar to us in hand paid, and the foregoing premises, we hereby agree to pay the amount to be paid by the party of the second part to the foregoing agreement, should the said party fail to pay in accordance with the agreements and terms of the foregoing contract.

“E. RUHLING & Co.”

It will be seen that Uznay agrees to take and pay for all the wood used and consumed at the two mills mentioned in the contract on the first and fifteenth of each month, and Ruhling & Co. guaranty the payment by him as stipulated in the agreement. Under this

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instrument, the defendants Ruhling and McCullough can certainly only be responsible for the fifty cords besides the quantity actually needed or consumed at the mills. Their guaranty cannot be extended beyond the strict letter of the principal contract. Uznay is of course liable for all the wood delivered to him, regardless of the use which he might make of it, but the guarantors only bind themselves to pay for fifty cords beyond what was actually needed or used in running the Phoenix Mills. No definite number of cords is agreed to be delivered by the plaintiff. The quantity which it was incumbent upon him to deliver was to be determined by the amount used or consumed by the mills. It is apparent, not only from the contract but from the testimony, that the liability of the guarantors did not extend beyond the value of the wood actually needed or consumed at the mills. Suppose no wood at all had been needed or consumed by these mills, it will hardly be claimed that the guarantors would be liable for all the wood which the plaintiff might have chosen to deliver to Uznay. As the quantity consumed was the measure of their responsibility, it was indisputably necessary for the plaintiff to show by his complaint that the wood, the price of which he is seeking to recover, was not only delivered, but further that it was needed or used at the mills. As the guarantors were not liable to the plaintiff for the price of all the wood which he might deliver to Uznay, but only for the quantity thus needed or consumed by the mills spoken of, certainly there should be something to show what quantity, if any, was so used. If none were needed for the use of the mills, the plaintiff has no cause of action against the guarantors, although he may have delivered wood to Uznay. The complaint sets out the contract, but it is impossible to ascertain from it whether a single cord of wood was consumed or needed at the mills.

The plaintiff seems to have labored under the impression that the guarantors were responsible for the price of all the wood which he might choose to deliver to Uznay, and upon that assumption founds this action. In this he was in error. We conclude therefore with the Court below, that the complaint does not state facts sufficient to constitute a cause of action, and hence could not support a judgment in favor of the plaintiff. This being the case, the Court

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below should either have dismissed the action or given the plaintiff an opportunity to amend his pleading. By trying the case and rendering judgment upon the merits, the plaintiff might possibly be barred from bringing another action against the defendants, although his complaint in this cause utterly failed to state any cause of action against them. As the complaint would not support a judgment in favor of the plaintiff, any error committed against him at the trial would not usually be considered prejudicial; but it may possibly be so, and when such is the case the error should be corrected. For example: if a judgment on the merits be rendered against a plaintiff, when it is clearly shown that the judgment dismissing his action would be the only proper judgment which could be rendered against him, in such a case he would be prejudiced by the error, for the judgment on the merits could be pleaded as a bar to a second action for the same cause, while a simple dismissal of the case could not be so used against him. It would certainly therefore, be the duty of an Appellate Court to modify the judgment so as to protect the plaintiff from any such result. A judgment in favor of the defendants for their costs in this action, and dismissing the complaint, would undoubtedly have been correct, and would not interfere with a second action by the plaintiff for the same case; but that a judgment on the merits should have been rendered against him is not by any means so certain. The only defense which seems to have been relied on by Ruhling and McCullough upon the trial was an agreement between them and the plaintiff whereby it was claimed they were discharged from all liability upon the contract of guaranty after the fourth day of May, A.D. 1864. That agreement, if entered into at all, was not completed until the fourth day of May. It was a new and independent contract, which if valid and operative, would relieve the guarantors from all liability under the guaranty. To produce that result it was necessary that the agreement relied on should possess all the elements of a valid contract. As that is new matter, in avoidance of the contract of guaranty, it should therefore have been specially pleaded by the defendants.

New matter which is simply an avoidance of the cause of action made out by the plaintiff should always be specially pleaded. Such

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is the rule declared by Chitty, and it is unchanged under the modern practice. (1 Chitty on Pleading, 615 ; 1 Van Sandtvoord's Pleading, 469, *et seq.*) The proof must be *secundum allegata*. No proof of new matter in avoidance can therefore be admitted unless it is so pleaded as to apprise the opposing party of the nature of the defense. There is no more reason why a defendant should be permitted to prove the execution of a contract the effect of which is to defeat the plaintiff's action, without having pleaded it, than to allow the plaintiff to prove the execution and to recover upon a contract which he has not pleaded. In the answers filed by the guarantors in this case there is no reference whatever to the agreement by which they claim to have been discharged from the contract of guaranty. They simply deny the allegations of the complaint, and affirmatively allege that the plaintiff delivered no wood "upon the credit or responsibility of the defendants Ruhling & Co. subsequent to the fourth day of May, A.D. 1864 ; that all the wood delivered after that time was delivered upon the sole credit and responsibility of the defendant Uznay, and not upon the contract of guaranty." Doubtless under this answer the defendants would have been permitted to prove that the plaintiff abandoned the contracts after the fourth day of May, and delivered no wood upon them after that time ; but they could not properly prove that the plaintiff entered into an agreement upon a sufficient consideration with them by which they were discharged from liability upon the guaranty. The learned Judge below however, permitted the defendants to prove such agreement notwithstanding the objections of plaintiff's counsel, and upon that proof the following findings were based, and upon them alone the judgment was rendered for the defendants :

"On the third day of May, 1864, the plaintiff, at the request of the defendants Ruhling & Co., agreed that they should be discharged from further liability upon said guaranty, in consideration that they would pay him the amount unpaid and due him from Uznay for wood furnished by the plaintiff to Uznay under their said contract of sale and purchase, as well as three hundred and seventy-eight dollars, the price of the wood so furnished on the first, second and third of May, 1864, but not then due, all of which

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amounted to about \$4,100, which amount was so paid to the plaintiff by Ruhling & Co., pursuant to such agreement.

"No wood was furnished by the plaintiff or used at the Phoenix Mills after the third day of May, 1864, upon the credit of the said Ruhling & Co. The plaintiff has been fully paid for all wood furnished by him and used at the Phoenix Mills prior to June 11th, A.D. 1864."

Without proof of the agreement by which the guarantors claim to have been released, we are satisfied that a judgment dismissing the action and for costs was all that could have been rendered against the plaintiff. Such a judgment would not prejudice his right to bring another action, but the judgment rendered by the Court, and which we have shown was founded upon testimony improperly admitted, could possibly be used against him as a complete bar to any future action to recover the sum of money claimed in this action. He was therefore prejudiced by the proof of the agreement to discharge the guarantors, and the findings and judgment thereon.

For these reasons we are compelled to direct a modification of the judgment, so that it shall be simply a dismissal at the plaintiff's costs, without prejudice to another action.

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The rule that a judgment must be reversed where instructions on a material point are contradictory, is not an absolute and unqualified rule. If one party asks for an instruction, which is given by the Court, laying down a rule of law in language too broad and unqualified, and the other side then asks an instruction, which is also given, qualifying and limiting the former instruction, and to some extent contradicting it; if the second instruction contains only sound law, the conflict between the two is not an error of which the party can complain who obtained the instruction which was too broad and unqualified.

An Indian who has appropriated water on the Public Lands of the United States may maintain an action for the diversion of that water, as well as any other person.—Per BEATTY, C. J. ✓

Any person getting possession of any dam or ditch for the diversion of water from an Indian, although there be no deed of conveyance, has the same right to maintain and enjoy such dam and ditch as the Indian had.—Per BEATTY, C. J.

Instructions given or refused by the lower Court will not be inquired into on appeal, unless the record shows that the giving or refusal to give them was excepted to at the time.—Per JOHNSON, J.

Instructions given to a jury without objection are presumed to be with the consent of the parties, and such consent is a waiver of any right thereafter to question their correctness in that particular case.—Per JOHNSON, J.

LEWIS, J., dissenting.—No person in this State can acquire title or right to any public land from an Indian.

A legal interest in land can only be conveyed in this State by means of a deed of conveyance in writing. The right to the enjoyment and repair of a dam, and to have the water so diverted flow through certain land, is such an interest in land as can only be conveyed by deed in writing.

ON PETITION FOR REHEARING.—If there is an entire failure to make any note of an exception, taken either by the Judge or his Clerk, and the term of Court expires at which the case was tried and judgment rendered, the Judge would afterwards have no authority to settle, or make a bill of exceptions showing the fact. He might settle the statement even after the term, if made within the time prescribed by law. The general rule is, that after judgment and the adjournment of the term, the Court loses jurisdiction of the case for most purposes.—Per BEATTY, C. J.

Under our practice, if an exception is actually taken at the trial, but not drawn up in form for the Judge's signature, and no note of it is made, either by the Judge or the Clerk, still the party dissatisfied with the judgment has a right to make his statement on motion for new trial, or on appeal, and in either of such statements he may show any exception that he really took during the trial, although there be no note of the same. For the purpose of settling such statements, the Court still retains jurisdiction of the case until the time prescribed by law has expired. After the statement is once made and settled, the

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Court below loses jurisdiction of the case, and no addition can be made to such statement.—Per BEATTY, C. J.

In the matter of amendment of Court records, the question should be treated as one of legal discretion, rather than of jurisdiction solely, that whilst the power is not unlimited, neither is it absolutely restricted to the particular term, but may be exercised within the bounds of a legal discretion, whereof the subject matter of the amendment and the circumstances under which it is allowed constitute the only test.—Per JOHNSON, J.

APPEAL from the District Court of the Second Judicial District.

R. M. Clark, for Appellant, made the following points :

If from any cause, at the time of Lobdell's appropriation, the waters of Desert Creek were passing down the natural channel to Lobdell's, the defendants could not, after Lobdell's appropriation, direct the water or any part of it to his damage, or to the diminution of the quantity claimed by him. (*Lobdell v. Hall & Simpson*, 2 Nev.)

The instructions given at the instance of the plaintiff, and those given at the instance of the defendant, are inconsistent, and contradictory, and irreconcilable. A new trial should be granted for this reason. (See Instruction 7 for plaintiff, and Instructions 6, 7, 8; Hilliard on New Trials, 214, 215; *Ferguson v. Fox*, 1 Met. [Ky.] 83; *Clarks v. McElroy*, 11 Cal. 154.)

The Court erred in giving Instruction No. 4 at the instance of defendants.

1st. The instruction is erroneous in assuming that *location of land* is an *appropriation of water* passing through it.

2d. It is erroneous in assuming the location of defendants to have been upon Desert Creek, the waters of which were in controversy.

3d. It is erroneous in ignoring any appropriation by the plaintiff, and in assuming that at the time of plaintiff's appropriation, and up to the time of the defendant's appropriation, no change had taken place in the dam or ditch.

Thomas H. Williams, also for Appellant.

Aldrich & DeLong, for Respondents, argued :

Where there is a disputed question of fact, and evidence has

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been given on both sides of the question, courts will not disturb the findings of a jury. (6 Barb. 141-3-4; 2 Cal. 423; 20 Id. 83; 24 Cal. 388.)

A new trial will not be granted where there is a conflict in the testimony; and where there is a conflict in the testimony of the party applying for a new trial, it is the more fatal. (*Cook v. Forsyth*, 30 Cal. 662; 26 Id. 275.)

When the testimony before a jury is contradictory, and the character and credit of witnesses are in question, a new trial will not be granted, on the ground that the verdict is against the weight of evidence. (*Winchell v. Latham*, 6 Cowan, 681; *Flaming v. Hollenbeck*, 7 Barbour, 275; *Adsit v. Wilton & Chamberlain*, 7 Howard Pr. 64; 5 Sanford, 180; 5 Minn. 339, 373; 9 Iowa [1 With.] 1; 6 Minn. 160; 7 Id. 114, 511; 27 Ill. 189; Id. 20.)

A verdict should not be set aside merely because the Court would have come to a different conclusion from that of the jury on the force and weight of the testimony. (*Mackey v. N. Y. Central R. R. Co.*, 27 Barbour, 529.)

When there is some evidence to support the verdict, and a motion for a new trial is overruled, the Supreme Court will not interfere. (*Baxter v. McKinlay*, 16 Cal. 77.)

Upon the second point—that the Court erred in giving the instructions that it did—we reply that, inasmuch as the Court gave all of the instructions asked for by the appellant, the error, if any error was committed, must be found in those given at respondent's instance. Those were carefully drawn from the books, embodying as we think the settled doctrines relative to water rights, as laid down by the Supreme Court of California in various cases, and by this Court in this case when formerly decided here. These general authorities we refer to as follows: "Plaintiff takes land on a stream, from which already a part of the water has been diverted by a ditch and dam. Subsequently defendant takes up the land on which the ditch and dam are situated. The plaintiff has no right to move the dam." This is the language of the Court in this case. (2 Nev. 274.)

Certainly it is equally true that the plaintiff has no more right to move or obstruct the ditch than the dam. And that the ditch

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remains of the same capacity, and unrepaired, is a fact that the jury found, and this Court will not review that finding.

The rule is this: If there was a ditch and dam existing then, (which is admitted) or if nature had formed a channel to the stream so that when Lobdell located, only a portion of the waters of that stream customarily flowed in the channel he claimed, his rights became fixed, and limited to such an amount as customarily flowed when he claimed it, and all right to remove the dam, obstruct the ditch, or interrupt any other channel, became lost by his failure to act until the rights of others intervened.

In support of the principles contained in the instructions in addition to the case cited, we refer to *McDonald v. Bear River*, 13 Cal. 220; Id. 33; 8 Cal. 329; 5 Id. 145; 12 Id. 28; 3 Id. 249.

And as to what is evidence of possession of a water right, see 6 Cal. 108, 558; 7 Id. 263; 12 Id. 49.

The error of an instruction must clearly appear. (Hilliard on New Trials, p. 17.)

Erroneous instructions or rulings of a Court, if not productive of harm, are no ground for a new trial. (Id. pp. 33, 35, 37, 210-219.)

A mistake in a Judge's charge is not always ground for a new trial. (*Depuyster v. Columbia Ins. Co.*, 2 Caine's, 85; *Alston v. Jones*, 17 Barb. 276.)

A plaintiff is not entitled to introduce evidence in rebuttal to the same points as those which were proven by it in making out its *prima facie* case. (25 Cal. 509; *Union Water Co.*, 2 Crasy.)

Opinion by BEATTY, C. J., JOHNSON, J., concurring specially, LEWIS, J., dissenting.

This was an action brought to recover damages for diverting the waters of Desert Creek, and also praying for an injunction to restrain future diversion of the water.

The facts, so far as they are undisputed, are as follows:

In the summer of 1860 the plaintiff located and occupied a ranch on Desert Creek. In December of that year he commenced the digging of one ditch for irrigating purposes, which was finished the

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following February. Immediately after this ditch was finished he commenced the construction of a second ditch, which was finished some time in March. These two ditches were of capacity to carry about three hundred inches of water, miners' measure, and this much water was required during irrigating season to properly irrigate plaintiff's ranch. In March or April, 1861, defendants located and occupied a ranch on Desert Creek, several miles above that occupied by plaintiff. The land which defendants located was irrigated, or at least had been irrigated, by means of an old ditch which had been dug by Indians many years before. This ditch, it appears, had been used by the Indians for running fish out on the meadow-land for the purpose of catching them. When the defendants were about to locate their ranch the Indians claimed this old ditch, and objected to the location by defendants. Finally the defendants bought out the Indians and made their location.

At the time the defendants made their location, which was, according to what we suppose the most reliable evidence on this point, about the third of March, 1861, there was no water running through the Indian ditch and so down to their meadow-land. Some water was running in that ditch at its head, but it all run over the banks of the ditch or through breaks in the bank near its head, and thus found its way back into the creek. In April however the water was running freely through the Indian ditch for its entire length, and flowing down to and over defendants' meadow-land.

At this point occurs the first conflict in the evidence of plaintiff and defendants.

The plaintiff attempts to prove that after the defendants made their location, in March or April, they diverted the water from the natural channel of the creek and turned it through the old Indian ditch on to their meadow-lands. The plaintiff does not attempt to establish this fact by direct or positive proof, but by circumstantial evidence, such as the appearance of the banks of the old Indian ditch showing recent repairs, etc., and by the opinion of witnesses that the old Indian ditch was in such condition in March, 1861, that it could never have flowed water on to the defendants' ranch without rebuilding or repairing the banks at those points where the water had been wasting away near its head.

The defendants, on the other hand, (who were on the stand as witnesses) deny that they made or caused to be made any repairs in the old Indian ditch or dam in the spring of 1861. Their theory of the case is that the water did not flow through the entire ditch during the early part of March, because it was obstructed by snow and ice frozen in the ditch. That as soon as the ice and snow melted out of the ditch the water commenced to flow through the entire length thereof, without any interference on their part. They allege that the first repairs they made were in the summer or fall of 1861, when a man was sent up by one of the defendants to repair some breach or deficiency in the ditch. They swear they had never enlarged the capacity of their ditch or raised their dam from the time they bought the Indians out to the commencement of this suit. That the only repairs done on either to amount to anything, was to repair damages done by plaintiff after the controversy arose about the prior right to the water in the creek.

Whilst the evidence is very satisfactory that no water ran in the lower part of defendants' ditch in March, (or the early part of March) 1861, it is very clearly shown that the water had for several seasons been running at least a portion of every year through the entire length of the Indian (defendants') ditch. It was also clearly proved that it was running in the head of that ditch in March, 1861. But whether the water was caused to flow down the ditch in April, 1861, by reason of repairs made in the upper end thereof, by defendants or others in their employ, or whether it commenced flowing through the entire length of the ditch simply by reason of the melting of the snow and ice, and the great abundance of water in the month of April, it is impossible to say. The proof on this point is not satisfactory either way, and the probabilities are perhaps about balanced. If we were called on to decide this point, or the weight of testimony, it would be a difficult question to determine.

The case was submitted to a jury, and under the instructions of the Court and such evidence as we have detailed, the jury found for defendants. The plaintiff moved for a new trial in the Court below, and failing in that, appeals to this Court from the order overruling his motion. The first point made by appellant's counsel is

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that the verdict of the jury was against law and evidence. And to support this proposition he contends that there is no question but that at the time defendants made their location the whole of the water of Desert Creek was flowing in its natural channel, and had been appropriated to the extent of three hundred inches by plaintiff, and that being so appropriated at the moment of defendants' location they had no right to divert it. Even admitting this proposition to be a correct one, still the record does not show the facts entitling plaintiff to a new trial. It is very clearly shown, as appellant contends, that at the very day the defendants (respondents) made their location the whole of the water was running in the natural channel of the creek down to appellant's ranch and ditches. But is not shown that defendants subsequently diverted it. For all that we can see in the record, a portion of the water of the creek may subsequently have flowed down defendant's ditch simply from the melting of the snows and ice. If so, the defendants are not responsible. Nor if the flow on to their ranch was only stopped by the snow and ice, would the plaintiff have been justified, after the snow and ice melted out, to have placed other obstructions in defendants' ditch to prevent the flow of water therein. As the evidence presents itself to us, this point is not well taken.

The next ground of complaint is that the Court gave to the jury contradictory instructions. On the part of the plaintiff, the Court, among other instructions, gave the following:

"If at the time of the plaintiff's location and appropriation of the water, if the appropriation by the plaintiff was prior to the location of the land and ditch by the defendants, and the ditch known as the old Indian ditch, and designated on the map as the Simpson & Hall ditch, was in existence, but was so blocked up, broken or obstructed as not to divert or permanently carry away from the main channel of the stream the waters of the stream; if in other words, by reason of any obstruction or break in the ditch, or any break in the dam, the water flowing into the mouth of the ditch found its way back to the original channel above the point where Lobdell diverted it, and afterwards the defendants, by themselves or employes, removed the obstructions or repaired the ditch, and by that means prevented the water from returning to the orig-

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inal stream, thereby diminishing the quantity of water appropriated by the plaintiff, then they must find for the plaintiff."

On the part of defendants, the Court among other instructions gave the following:

"The jury are instructed that a person locating upon a stream and appropriating the water, has a right to have it flow (so far as the natural channel is concerned) in precisely the same manner as it did when he located, and no prior locator has any right to make any such change in the natural channel as will injure subsequent appropriators of the same water."

Sixth.—"The jury are instructed that the foundation of the right to water passing over public lands is first appropriation, 'first in time, first in right,' is the rule. Hence, if you believe from the evidence that either the defendants or other persons first appropriated the waters of said stream to the extent or amount that it was being used by the defendants at the time of the commencement of this action, and that such appropriation had not been abandoned, you must return a verdict for defendants."

Seventh.—"The jury are instructed that no temporary obstruction of a portion of a dam or ditch, or any temporary obstruction of the latter, will result in any waiver or loss of right to appropriated waters. If, therefore, you find from the evidence that the ditch and dam of defendants existed prior to plaintiff's appropriation of the waters of Desert Creek, and had been before and has been since said time customarily used in flowing water from said stream on to the land now claimed by defendants; and if you also find that the defendants have never diverted the waters of said stream by any other means but by said dam and ditch, you will find a verdict for defendants; although it may appear that at the time of plaintiff's location, by means of some temporary injury to the dam or ditch, no water at that time was flowing through the defendant's ditch."

Eighth.—"If you, the jury, believe from the testimony, that the dam and ditch of defendants, by which alone they divert the waters of Desert Creek, both existed prior and at the time of plaintiff's location as they existed at the time of defendants' location and at the time of the commencement of this action, you will find a verdict for the defendants."

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The sixth, seventh and eighth instructions the appellant contends contain matter at variance with the law, as laid down in the seventh instruction given on the part of plaintiff. If these instructions conflict with each other, he contends that the case must be reversed, because contradictory instructions are calculated to mislead the jury.

The rule that a case must be reversed where instructions on a material point are contradictory is not as unqualified as appellant contends for. If one party asks for an instruction which is given by the Court, laying down a rule of law in language too broad and unqualified, and the other side then asks an instruction, which is also given, which qualifies and limits the former instruction, and in some respects contradicts it, if the second instruction contains only sound law, the conflict between the two instructions is not an error of which the party can complain who obtained the instruction which was too broad and unqualified. It might be that this was error injurious to the other side, for the jury might not understand that one instruction was a modification of the other, and might be misled by the too broad language of the first. But they could not do wrong by being governed by the modification. The error could not be complained of by the party who got the wrong instruction, or the instruction not properly qualified and guarded.

Under this rule let us examine the defendants' instructions, and see if they contain any error. The language in defendants' sixth instruction, to which exception is taken, is this: "If you believe from the evidence that either the defendants or other persons first appropriated the water * * * and that such appropriation had not been abandoned," etc. It is contended that there is no proof in the case that any other person, except uncivilized Indians, had ever appropriated this water prior to the time defendants took up their ranch. That defendants could derive no advantage from their purchase from these Indians, and therefore it was improper to insert the words "or other persons" in the instruction, because it was calculated to mislead the jury, and induce them to believe that defendants could, by means of a title derived from the Indians, carry back their claim to the water to a date long prior to the time when they themselves first took up the ranch.

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That this presents a serious question in the case there is no doubt. If the defendants could derive no advantage from the acts of the Indians, then it certainly was improper to have inserted in the sixth instruction the words "or other persons." The proof did not pretend to show, or attempt to show, that others than the Indians had dug any ditch or appropriated any water before defendants took up their ranch.

At common law any person, either Christian or heathen, alien resident or non-resident, with the single exception of alien enemies, might bring suit to enforce any civil rights they might possess. It is true that aliens under the common law could not lawfully hold real estate, and transmit the same to their heirs; yet they might buy it and maintain trespass for injuries thereto, or their lessee might maintain ejectment. It has been held in the United States that an alien might maintain any personal action to enforce his rights to land by him purchased until proper steps had been taken to declare such land forfeited to the State. It has been doubted whether he could maintain a real action, though it is said he might defend himself against such action. (See *Fairforth, devisee, v. Hunters' Lessee*, 7 Cranch, 603, where the whole subject is fully discussed.

If then all persons, without regard to nationality, are in this country allowed to maintain any action to enforce their rights to the enjoyment of all property, personal or real, we see no reason why an Indian who has appropriated water on the public lands of the United States might not maintain an action for the diversion of that water as well as any other person. If an Indian could maintain an action for diversion of water, then he certainly would have a fixed interest in the waters so diverted, and a clear right to repair any temporary damage in his ditch or dams. If then the plaintiff located his ranch, or began the digging of his ditches, at a time when the water was all escaping from the Indian ditch through a breach therein, it would not deprive the Indians of a right to repair that ditch.

But admitting the Indians had a right to repair that ditch, it is still contended that defendants are in no manner substituted to the rights of the Indians, and for two reasons: In the first place, Con-

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gress has prohibited all purchases of land from Indians ; and in the second place, the fifty-fifth section of our Act in regard to Conveyances reads as follows :

“ No estate or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing.”

Now it is contended that the appropriation of water and the right to repair the ditches, etc., in which it is carried, is so intimately connected with the use of the land through which the ditches are dug and the water conducted, that no right to use the water can be transferred without also transferring some interest in or power over the land ; that this was not done by the Indians in this case, because it is not pretended they made any deed or grant, but merely a parol transfer of their claim on the water ; nor if they had attempted to make such deed would it have been available in the face of Congressional Acts prohibiting sales of land by Indians. We do not deem it necessary to go into a critical examination of either the fifty-fifth section of our Act concerning Conveyances, nor of the several Congressional Acts prohibiting the sale of lands by Indians. If the Indians themselves had a right to repair the ditch, we think those who obtained the possession under them had the same right. (See *Oatman v. Dixon*, 13 Cal. 36.) If, when the plaintiff located his ranch, he located it with a subsisting right on the part of the Indians or any other person or persons to repair this ditch, and throw a part of the waters of Desert Creek on to the ranch now held by defendants, we do not think the right to repair the ditch was lost by the possession passing into other hands. We think the rights of plaintiff and defendants are just the same as they would have been if the Indians had repaired their ditch before transferring possession thereof to defendants. Under these views, there is nothing objectionable in this sixth instruction.

The seventh instruction is objected to because the jury are told in substance if the water flowed customarily through the Indian

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ditch before and after the plaintiff's location just as it did when this suit was brought, they must find for defendants, notwithstanding some temporary break in the ditch or dam may have thrown all the water on to plaintiff's premises at the time of his location.

If the sixth instruction was right, this was also right for the same reasons. If right, it is right on the ground that the Indians or those holding possession under them had a right to repair any temporary break in the dam or ditch.

The same observations apply to instruction number eight. Instruction number four asked for by defendants certainly contains only correct legal principles, and we think very clearly expressed. Appellant also complains of an abuse of discretion on the part of the Court, in refusing him the privilege of reexamining several witnesses in regard to the appearance of recent repairs on the old Indian ditch. If our views of the case are right, this evidence would hardly have been material. If defendants had a right to make repairs, it would have availed the plaintiff nothing to have strengthened his evidence on this head. He had already examined several of his witnesses on this point, and we do not think it was any abuse of discretion on the part of the Court to refuse to allow him to go into this question again. It is not strictly in rebuttal of the defendants' evidence.

Per JOHNSON, J.

This action was originally commenced in Esmeralda County, and upon a trial, judgment rendered for plaintiff. Defendants appealed, and judgment reversed. (2d Nevada Reports, 274.) The case was then transferred to Douglas County, and upon the second trial judgment was for the defendants, and a new trial refused by the District Court; whereupon plaintiff brings this appeal from both the order refusing such new trial and from the judgment.

The notice of motion for a new trial in the Court below states as the grounds therefor the following:

"1st. That the verdict of the jury in said cause was contrary to the evidence, and that the evidence therein was insufficient to sustain said verdict.

"2d. That the said jury was not drawn and selected nor impaneled according to law.

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"3d. That the Judge erred in giving instructions to the jury asked by defendants.

"4. That the Court erred in overruling the objections taken by plaintiff's counsel upon the trial of such cause, and duly excepted to by plaintiff.

"5. That the Court erred in sustaining the objections of defendants' counsel taken upon said trial, and duly excepted to by the plaintiff.

"6th. That the Court erred in allowing the jury to separate and disperse after they had heard a portion of the argument of counsel, and before the same was concluded, and before the verdict."

The only difference observable in the motion itself and the notice is, that the motion did not include the last or sixth ground, and the fourth and fifth are explained as follows: "That is to say, the fourth and fifth objections are intended to cover any and all errors of law occurring at the trial and excepted to by the plaintiff." No affidavit was offered in support of the second ground, and such as were considered on the hearing of the motion can at best be regarded as falling under the sixth and seventh clauses of Section 198, Civil Practice Act, 1861, p. 346. "Sixth. Insufficiency of the evidence to justify the verdict or other decision; or that it is against law." "Seventh. Error in law occurring at the trial, and excepted to by the party making the application." The grounds of error stated by counsel for appellant, and upon which we are asked to reverse the order refusing a new trial and the judgment, may be grouped under the following general heads: "First, the verdict of the jury is contrary to law and evidence; second, the instruction given at the instance of the plaintiff and those given at the instance of the defendants are inconsistent, and contradictory, and irreconcilable." Other points than these, but not specified as grounds of error in the written assignments of counsel, all of which relate exclusively to the ruling of the Court below in rejecting certain evidence offered by plaintiff, claimed to be in rebuttal of defendants' testimony, were also discussed by counsel on the argument.

The most important questions, perhaps, which counsel for appellant has urged, and those upon which he seems chiefly to rely,

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grow out of certain instructions of the Court, and hence it becomes necessary for us to determine whether or not these instructions can now be reviewed; for it is a rule of universal application, that instructions of a subordinate Court given or refused, will not be inquired into on appeals, unless excepted to at the trial below. (8 Johnson, 495; 1 Wendell, 418; 1 Cowen, 622; 5 Cal. 647; Id. 478; 7 Cal. 38; Id. 423; 2 Bac. Abr. 112, Bill of Exceptions, and cases there cited.)

The settled statement used on the argument of the motion in the lower Court, and embodied in the record before us, comes indorsed as a "particular history of the proceedings and all the evidence taken and submitted upon the trial." (Page 2 of Transcript.) The instructions asked by plaintiff were all given, as also were those of defendants, except the first two, which were refused. In no part of the transcript, by bill of exception, minutes of the Court, or otherwise, are any exceptions shown to have been taken by either party to the giving or receiving of any instructions. Nor in fact does the third ground assigned on motion for new trial allege that the errors in giving these instructions were "excepted to by the party making such application," as required by Sec. 194 of the Practice Act; and therefore in a measure confirms the belief that no such exceptions were taken at the trial, and were not considered on the motion for a new trial in the District Court.

Instructions given to a jury without objection are presumed to be with the consent of the parties, and such consent is a waiver of any right thereafter to question the correctness of the instruction as applied to the particular case; for, says Burnett, J., in *Letter v. Putney et al.* 7 Cal. 423, "a party cannot first take his chances of a verdict upon instructions given or refused without exception, and then afterwards except to the action of the Court upon a motion for a new trial."

Excluding all inquiry in respect to the instructions, in my judgment, virtually disposes of this appeal, as the further points made for appellant, to which exceptions were duly taken at the trial, I consider to be without merit. A large number of witnesses testified upon the trial, and in some respects the evidence is conflicting; wherefore, accepting the instructions of the Court below as the law

governing the case, there can be no just ground for this Court to disturb the verdict. The questions made as to the exclusion of certain evidence, the rulings of the Court thereon being excepted to by the plaintiff's counsel, are equally untenable. The proffered testimony of the witnesses Rickey, Chase, Lobdell, Smith, and Wheeler, as to the condition of the old Indian ditch, had been quite fully gone into by plaintiff in his opening evidence, and in no just sense can it be held error in the Court below in refusing to allow the same testimony to be repeated in rebuttal.

The statements of Clay in respect to repairs on the ditch were clearly inadmissible as evidence against defendants. From this view of the case, it follows that the judgment should be affirmed.

Opinion by LEWIS, J., dissenting.

It is declared by Act of Congress that "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. And it shall be a misdemeanor in any person not employed under the authority of the United States to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian, nation, or tribe of Indians, for the title or purchase or any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months." (Brightley's Digest, 483, Sec. 99.) From this law it would seem the defendants could acquire no title whatever from the Indian or Indians, from whom they claim.

But should this law be put out of the case entirely, and the Indians' right to convey be conceded, I should still be led to the same conclusion; for it appears from the record that no legal conveyance was ever made by the Indian.

Section 55, Laws of 1861, p. 18, declares that "no estate or interest in lands other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law,

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or by deed or conveyance in writing, subscribed by the party creating, granting, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing." This is substantially the Utah law which prevailed in the Territory of Nevada at the time of the transaction in question. That the right to the enjoyment of the dam and to have the water flow through the ditch in question is an interest in land, is fully supported by the following authorities: *Hawkins v. Shippam*, 5 Barn. & Cress, 221; 7 Dow & Ky. 783; *Crocker v. Cowper*, 1 Cro., Mees & Ros. 418; *Wood v. Leadbetter*, 13 Mees & W. 836; *Mumford v. Whitney*, 15 Wend. 380; *Brown v. Woodworth*, 5 Barb. 580; *Phillips v. Thompson*, 1 John. Ch. 131; *Bennett v. Scott*, 18 Barb. 347.

The defendants do not pretend to claim as lessees, hence, there being no deed or conveyance in writing as required by the statute, they acquired nothing from the Indian. In my judgment, therefore, the sixth instruction given at the instance of defendants, was incorrect. For these reasons I am constrained to dissent from the conclusions of the Chief Justice.

PETITION FOR REHEARING.

On petition for rehearing, BEATTY, C. J., delivered the following opinion, which was specially concurred in by Mr. JUSTICE JOHNSON:

There is a petition for rehearing in this case in which two principal points are urged. The first is that the counsel for respondent, on the argument of the case, did not make or rely on the point that no exceptions were taken in the Court below to certain instructions, in the giving of which the appellant contends error was committed.

We believe no such ground was taken in the oral argument, and it certainly is not alluded to in respondents' brief.

If we could see that appellant lost any advantage by this admission of respondent, we certainly should not hesitate to grant the rehearing. But if we were to grant such rehearing, certainly at the next trial or argument of the case the respondent would raise

the point, and the result would be the same. When the petition in the case was first filed, the Court made known to counsel for respondent that if there was anything in the record showing that the charge had been excepted to at the trial in the Court below, but had been omitted by some oversight from the transcript sent to this Court, we would not hesitate to grant the rehearing. For in that case had the objection been raised on the hearing of the case in this Court, the appellant might have asked for a continuance, with leave to amend the record.

But we now learn that the *record* does not show that any exception was taken at the trial of the cause; but in lieu thereof the appellant produces the certificate of the District Judge, showing that in fact the appellant did object to the instructions given at the instance of the respondent; did except to the ruling of the Court in giving them; that the exception was *allowed*, and the clerk directed to note the exception, which however he omitted to do.

The appellant contends that under these circumstances, if a rehearing is granted, he can procure an amendment of the record in the Court below and bring up a transcript showing the exception.

If it would be proper for the Court below to make the amendment as suggested, then appellant should have a rehearing. If such amendment cannot be legally made, then no rehearing should be allowed on this ground.

Our statute, in regard to exceptions, provides in effect (we give the substance and not the words of the Act) that when an exception is taken in the progress of a trial, it shall be written out by the party excepting, or if he requires it by the clerk, and settled or corrected forthwith, or the *Judge* may note it in his minutes and afterwards settle it in a statement of the case. The correct practice is immediately to settle the exception and have it signed by the Judge forthwith; for the Judge himself to make a short minute of the same, and afterwards have it drawn up in regular form and signed during the term at which the case is tried; or else for the appellant to make his statement on motion for new trial, or on appeal, as the case may be, and have it settled within the time and in the manner prescribed by law. If the clerk should make a minute of the exception under the direction of the Court, doubtless

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it would answer the same purpose as if the Judge made it. But certainly a Judge is more capable than a clerk to note the exact point of the exception and make such memorandum as will, after the trial is over, enable him to settle the bill correctly. If there is an entire failure to make any note of an exception taken, either by the Judge or his clerk, and the term of Court expires at which the case was tried and judgment rendered, we do not see by what authority the Judge could afterwards settle or make a bill of exceptions showing the fact. He might settle a statement even after the term if made within the time prescribed by law. The general rule is that after judgment and the expiration of the term, the Court loses jurisdiction of the case for most purposes. It may correct its judgment in all matters of clerical mistake, and in some other particular matters, even after the expiration of the term; but such corrections depend not on the memory of the Judge, but on some written evidence or memorial connected with the case. It is not thought best to trust to the recollection of the Judge in such cases.

Counsel for petitioner seems to have examined the authorities in regard to amendments of records, and settling bills of exception. He has found none, or at least we have found none in the various authorities referred to, where a bill of exception has been sustained that was settled by the Judge who tried the cause, after the expiration of the term at which the judgment was rendered, upon his simple memory of what occurred at the trial, and when no note or memorandum was made at the time of the exception. Nor do we find a single case in which it has been held that a Judge, after the expiration of a term at which final judgment has been rendered, could, on his simple recollection of what had occurred at the trial, amend the record so as to cure any fatal defect therein. Such amendments may be made before final judgment, or before the end of the term at which final judgment is rendered. They may be made after judgment, and after the expiration of the judgment term, if there is anything to amend by. So too, if the record is mutilated after judgment, the Court may restore it to its former condition. Upon all these points the diligence of counsel has found authorities, but they do not conflict with the views above expressed by this Court, in regard to amendments of the record.

Under our code there is no necessity certainly for a departure from the well established practice in this respect. If an exception is actually taken at the trial, but not drawn up in form for the Judge's signature, and no note of it is made either by the Judge or clerk, still the party dissatisfied with the judgment has a right to make his statement on motion for new trial, or on appeal; and in that statement he may show any exception that he really took during the trial, although there be no note of the same. For the purpose of this statement the Court still retains jurisdiction of the case until it is finally settled, or the parties have lost their rights by some laches, although the term may have expired.

After the statement is once made and settled, we think the Court below has lost jurisdiction over the case, and no addition can be made thereto.

The remaining point on which petitioners rely for a rehearing, relates to the view taken by one member of this Court in regard to the sixth instruction, given by request of respondents. Petitioners' first proposition on this subject is, that the Indians themselves who built the old ditch and dam alluded to, in the opinion of the Court, had no right to the water, and therefore none could be transferred to a third party. The ground assumed is, that the diversion of water for the mere temporary purpose of stranding fish, is not converting it to a useful or profitable purpose, and therefore the party thus diverting it acquires no rights. Had the water been diverted by the Indians for the mere purpose of catching fish upon one occasion, this position might have been right. But as I understand the testimony, it was a permanent diversion of the water, so as to run it over flat meadows, thus enabling the Indians at any time to catch fish among the grass of the meadow-lands, which they could not catch whilst the waters were confined in a narrow channel. I cannot see but that it is just as legitimate for an Indian to turn water over meadow-lands, to enable him to catch fish for his subsistence, as for a white man to turn it over the same land to increase the growth of grass.

But it is said there is no proof that the defendants have purchased from the right Indian. There is no proof that the same Indian or Indians who built the dam and ditch sold the privilege

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to respondents. That if any sale or transfer could be made, it must be made by the tribe and not by individuals, etc.

According to my ideas of the law, it makes no difference whether the right Indian, the wrong Indian, or no Indian made the transfer to respondents. The question is: Did the right to repair that old Indian ditch exist at the time it is contended by appellant that respondents did wrongfully repair the same?

If the Indians (the Indians who built the ditch and dam) had the right to repair the same, then according to my views the person who got possession of the land through which the ditch passed had the same right, even though that was acquired by a naked trespass.

To illustrate: B owns lower farm; A has the oldest location and appropriates just half the water. B appropriates only what is left after A is supplied, but would be able to appropriate all the water of the creek if A did not first use it; and whenever A fails to use it he does appropriate all. So that he has in effect a right to all the waters of the creek except in so far as the same are appropriated by A. Now whilst A is thus appropriating half the water on the creek on his farm, C, a mere naked trespasser, expels A from his farm, and so continues to use just half the water as A had previously done, without any change in the ditch or dam; yet it will hardly be contended that B would have any right of action against C. I apprehend the only party who could, under these circumstances, maintain an action against C would be A, who was ousted. Suppose again, whilst C is in possession the dam breaks away, so that all the water for a few days passes down the creek and is used by B; could B maintain an action as against C for repairing the dam? I think there is hardly a question but that any lawyer would answer this in the negative. Again: suppose the upper dam breaks away twenty-four hours before he expels A, and he upon getting possession immediately repairs the dam; is there in such case any cause of action on the part of B against C? After mature reflection, I think there would be none. And the case under consideration is, in my mind, precisely analogous to the one last supposed. If there was a right existing in any person or persons to repair that ditch, I apprehend the plaintiff had no cause of action for such repairs. It

was not a legitimate inquiry whether the repairing was done by the right man or the wrong one.

There was no trespass committed on the lands of appellant. If any act done off of his land only turned the water where of right it belonged, it might be an injury; but it was no legal damage to plaintiff—it was *damnum absque injuria*.

With respect to the position that the appellant was the first appropriator of the creek, and therefore had a right to have the water flow in its natural channel, and as a corollary the right to remove any obstructions in the channel, we think that point fully settled when this case was first before us. (See this same case, 2 Nev. 274.)

We do not feel disposed to review a decision which has gone down to the Court below and been acted on. Even if we could go into the review of a case which has been decided and acted on, we do not think that anything has been shown calculated to change our views on that point. Whilst the writer of this opinion has endeavored to express the views of the Court in regard to the first point noticed in this response, he only expressed his own views as to the second point.

On that point he stands alone in the first opinion in this case, and only intends herein to express his individual views.

Rehearing is denied.

Opinion by JOHNSON, J.

The authorities cited by Attorney-General, General Clarke, of counsel for appellant, all tend to maintain this one proposition: that Courts may, and sometimes do, permit amendments of their records after adjournment of the term in which the trial or other proceeding was had. I accept this as a proper statement of the law, although I know that the reverse rule has oftentimes prevailed in Courts of high authority with the profession; and probably a precedent of this Court shown by its rulings, at least in one case, would forbid an amendment of the character now sought to be made in the District Court records.

In *Bowers v. Beck et al.*, 2 Nev. 139, an amendment was made by the District Judge to a bill of exceptions allowed by him within

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a few days after its allowance and the adjournment of the term, by striking out a certain statement which had no existence in point of fact ; and thereby made the bill correspond to the truth. The case was a very striking one indeed, and one which, if Courts could ever allow an amendment after the expiration of the term, called for the exercise of that authority, as will be seen on an inspection of the reported case.

The attention of the Court was called to these facts before argument on the appeal, and the part so stricken from the bill of exceptions was restored, and upon it the case heard and determined, although one of the Judges (Beatty) intimated that perhaps under that state of facts a bill of exceptions might be corrected ; and another of the Judges (Brosnan) seemed to disapprove of the general principle that Courts, after adjournment of the term, lost jurisdiction over their orders and judgment for purposes of amendment. But the action had therein, in refusing the amendment, I am not willing to accept as a precedent governing in similar cases, nor can I give sanction to the doctrine that Courts and Judges lose all power and jurisdiction over their orders or judgments after the expiration of the term in which they may be made and rendered, without giving full consideration and weight to the exceptions which should be made in the application of the rule. In fact when we turn to the books, in search for the grounds upon which the rule has been maintained, we discover that in part it has no present existence, consequent upon the changes wrought in judicial systems and practice ; whilst in other particulars it is upheld by statutes and rules of Court having no application with us. And indeed, in the long course of judicial decisions, the rule has become so far relaxed and the exceptions extended that the proposition now partakes more of the qualities of an *exception* to the general rule than the general rule itself. Wherefore I conclude that in the matter of amendment of Court records, the question should be treated as one of *legal discretion* rather than *jurisdiction* solely ; that whilst the power is not *unlimited*, neither is it absolutely *restricted* to the particular term, but may be exercised within the bounds of a *legal discretion*, whereof the subject matter of the amendment and the circumstances under which it is allowed constitute the only test. To

this extent probably the learned counsel and myself do not disagree, therefore let us apply these rules to the case in hand.

The statute (Sec. 188, Prac. Act) defines "an exception to be an objection taken at the trial to a decision on a matter of law * * * in the charge to the jury." "Section 189. The point of the exception shall be particularly stated, and may be delivered in writing to the Judge, or if the party require it, shall be written down by the clerk. When delivered in writing or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. When not delivered in writing or written down as above, it may be entered in the Judge's minutes, and afterward settled in a statement of the case." The affidavit and certificate filed in support of the petition shows that a certain instruction "was excepted to at the trial, that it was allowed by the Court at the time the instructions were read to the jury, and the clerk ordered to enter the same." We are not advised as to where this particular entry, ordered by the Judge, was to be made, but from the usual practice of District Courts in having their clerks keep minutes of their proceedings, we presume that the entry was intended to be in the minutes thus kept by the clerk. The fact of such exception being stated, the direction of the Court to the clerk, and his neglect to make the entry, are the grounds upon which General Clarke claims a rehearing.

But the showing thus made, the earnest and labored argument of counsel, and citation of numerous authorities, all stop short of the real point to be considered now. That is: Did the failure of the clerk to make such entry deprive the party of any substantial right, and if it had been done would the transcript on appeal necessarily have shown the exception? For if the entry had been made in the minutes, and yet could not of itself be introduced into and become a part of the record on appeal, most clearly his neglect so to do occasions no injury to appellant of which he can complain.

Admit that it was the duty of the clerk when directed by the Court to note the exception in his minutes, although the statute does not contemplate such a mode, it would not follow as a consequence that the entry would appear in the transcript; for the rule is well settled that exception cannot be shown by such entries alone.

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(*Gunter v. Geary*, 1 Cal. 462; *Johnson et al. v. Sepulveda*, 5 Id. 149; *Castro's Executors v. Armesti*, 14 Id. 38; *People v. Empire G. & S. M. Co.*, [No. 1372] Supreme Court, Cal., Oct. Term, 1867.)

Although on the argument of a motion for a new trial reference may be had to such minutes, yet on appeal, where there is no formal bill of exceptions taken at the trial, it can be brought up only by means of a statement; therefore if the clerk had made the entry as directed, it would have been of no avail as to the matter in question, and equally so would have been the proposed amendment, if appearing on a reargument of the appeal. It would not help appellant's case in the least, and therefore can furnish no sufficient grounds for the application.

The same distinguished counsellor, in urging the matter of his position, complained that the decision of one of the Justices turned upon a point not denied as involved in the record, yet which was not suggested by opposing counsel on the argument.

This perhaps is true, and if the point could be available to appellant on a further hearing, might perhaps be a sufficient reason to grant his request; but with the views already expressed on the point, it could serve no beneficial purpose to allow it. And further on this point, chiefly in response to matters suggested by the other counsel for appellant. It rests with appellant to show affirmatively the error complained of in the Court below. The position of respondent is different. His relation to the appeal is purely defensive. The presumptions are all in favor of the judgment of the lower Court, and by such affirmative showing of error in its rulings or judgment, can it be successfully overthrown. If the errors complained of be wholly or in part the giving or refusing instructions, as the case might be, to which ruling appellant has excepted at the proper time, it is not enough to show such instructions were given or refused according to the facts, but furthermore that the party injured by such ruling properly excepted thereto; for it is not an error of the lower Court which can be removed here, unless such exceptions were taken. The several means by which these exceptions may be brought up has been already shown, and whilst the fact that such exceptions were stated at the trial is

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asserted, it is not pretended that any of the statutory methods have been employed to bring up the evidence of such fact.

But it is insisted that respondent has waived the necessity of any showing of such fact by record evidence, in treating the case on motion for new trial as if the exception had been properly taken. Concede the law of counsel's proposition; wherein do we ascertain the fact as stated? Neither the affidavit of the one counsel or the certificate of the Judge show such fact; whilst the statement and records are equally silent in relation to any such matter, else perhaps this point of inquiry at the time would be of less moment. We cannot follow counsel outside of the record to supply evidence in aid of their law propositions.

On another point—that "the verdict and judgment are not supported by the evidence"—I see no sufficient reason to change the views expressed in my former opinion, nor do I conceive it is necessary for anything which is before us on this appeal to state my views as to the Indian title.

I concur in refusing a rehearing.

I. H. DALL, RESPONDENT, v. THE CONFIDENCE SILVER MINING CO., APPELLANT.

When a proceeding for partition of realty is had in a Court of Equity, the Court will not only proceed to divide the land, but will, in a proper case, direct an accounting, and do equity in the case by making parties account for rents, etc.

When a bill is filed for a partition of realty, the Court should not decree a sale except in those cases where a partition would manifestly be injurious to the interests of the cotenants.

Under our statute, if any one or more of the cotenants files an affidavit showing that a sale of an entire mining claim would be injurious to him or them, the Court must proceed to divide the claim as prescribed by statute. A sworn answer setting up the same matter is equivalent to the affidavit required by the statute.

Whether one tenant in common of a mining claim will be allowed compensation for labor or money expended on the common property in developing it—*quere?* If such compensation is to be allowed, it must be for work done on the common property.

It could not be allowed for developments made on an adjoining claim, which incidentally enhanced the value of the common property.

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APPEAL from the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING, presiding.

The facts are stated in the opinion.

Hillyer & Whitman, for Appellant.

Mining claims in this State are regulated by statute, and a division of a mining claim can only be effected in the manner pointed out by statute.

In Statutes of 1861, p. 434, under the statute the Court could not order a sale.

A proceeding for partition is an equity proceeding, although regulated by statute.

A Court of equity will not permit litigation by piecemeal. (5 Cal. 114.)

The Court should therefore have permitted appellants to make proof of their expenditures in developing the mine.

If the suit was not strictly an equitable proceeding in its inception, equitable matters were set up in the answer which should have been adjudicated. (For the rules on this point see *Coffin v. Heath*, 6 Metc. 80; 7 Dana, 177; *Hitchcock and Wife v. Skinner et al.*; Hoff. Ch. 21; Storey's Eq. Vol. 2, Sec. 1236, p. 462.)

Wood & Hillyer, for Respondent.

The statute provides for sale *or* partition of real property. This proceeding was for a sale of the property. Mines are real property, and like any other real property may be sold under the provisions of Section 661. Section 707 only provides for a partition, but does not take away the right to apply for a sale under the sixty-first section. Section 708 shows that a petition for sale of mines was contemplated by the draughtsmen of the statute. That redress could not be had under the provisions of Section 708, which only relates to the mode of partitions. The right of one tenant in common to claim a partition or sale was a common law right, and when the statute prescribes one mode of enforcing that right, it does not exclude others heretofore existing.

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The new mode is only cumulative. (1 Van Santvoord's Pleadings, 304; 1 Storey's Eq. J., title Partition.)

The parties are found to be tenants in common; and it is further found that partition cannot be made without serious injury to one of the parties. In such case, a sale would seem to be absolutely necessary.

The appellant had no right to contribution for expenditures. A tenant in common may lawfully occupy the common property so long as he does not exclude his cotenant. If he expends money and labor, the profit, if any, inures to his own benefit. If he loses money by his operations, it is his own loss. (*Pico v. Columbet*, 12 Cal. 414; 16 Cal. 471.)

A tenant in common may compel his cotenant to contribute to repairs necessary to preserve the property, but before he can enforce contribution, he must show the necessity for these repairs. (4 Kent's Com. 370.)

Opinion by LEWIS, J., BEATTY, C. J., and JOHNSON, J., concurring.

This is a proceeding under the statute concerning the partition of real property, the plaintiff seeking by his bill a sale of a mining claim consisting of twenty-five feet of ground in Gold Hill, owned by himself and the defendant as tenants in common. After the usual allegations in this character of proceeding, the bill concludes as follows: "And plaintiff further avers that he is desirous that a partition of said premises should be had, and the interest held by plaintiff and defendant be divided between them according to their respective rights; but plaintiff avers that said premises are so situated that a partition thereof cannot be made without great prejudice to the owners, to wit: to plaintiff and defendant, and that for the protection of the rights of the plaintiff and defendant it will be necessary that said premises be sold." The defendant in its answer meets this allegation of the complaint in the following manner: "Now comes the defendant and answering unto plaintiff's complaint denies that the premises described in said complaint are so situated that a partition thereof cannot be made without great prejudice to the plaintiff and defendant as by the plaintiff alleged.

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It further denies that for the protection of their interests it will be necessary that the said premises be sold, but avers that for all purposes of mining with convenience, twelve and one-half feet of ground can be worked with as much facility as twenty-five feet; that the defendant is a corporation formed for mining purposes, and hath issued its certificates of stock for the number of feet in its claim, including its undivided half of the ground described by plaintiff's complaint; that to sell said ground would create confusion in the affairs of the company and seriously depreciate its stock, so that it shows to the Court that it would be contrary to equity and good conscience to sell said premises."

Then follows an allegation to the effect that the defendant has expended a large sum of money in developing the mine; that by the money so expended the plaintiff's interest in the mine had been enhanced in value; that by the labor of the defendant the mine has been developed, and that plaintiff though knowing of such labor and expenditure, interposed no objection thereto. Upon these facts an accounting is prayed for, and it is asked that the plaintiff be decreed to pay his equitable proportion of the expense incurred in such development.

At the trial the plaintiff's witnesses testified in substance that twelve and one-half feet of mining ground in Gold Hill could not be mined to advantage, and it did not afford sufficient room for the erection of the necessary buildings; that twenty-five feet (the extent of the entire claim) could be worked more cheaply, and advantageously, and securely than twelve and one-half feet; that a mine consisting of but twelve and one-half feet could only be worked through the adjoining claims, and that one working such mine would be entirely dependent upon the owners of the adjoining mines for the means of taking the ores from it. This is substantially all the evidence introduced by the plaintiff.

The substance of the defendant's evidence on this point is, that twenty-five feet of mining ground could be worked and developed with no more safety or profit than twelve and one-half feet. The only object of this testimony was to show that no controlling necessity existed for ordering a sale of the entire mine. Upon this point therefore, there is a conflict in the testimony presented by

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the respective parties. The defendant further offered to prove that it had expended a large sum of money in attempting the development of the mine; that such expenditure had been greatly in excess of the receipts, and that the development so made by the defendant had greatly enhanced the value of the mine. This testimony was offered for the purpose of obtaining an accounting, but was ruled out by the Court below and an exception taken by the appellant.

The Court found as facts established in the case "that the parties to this action, plaintiff and defendant, are seized of and entitled to the mining property and quartz ledge mentioned in the complaint in this action, as tenants in common thereof in fee simple, each owning an equal undivided one-half of the same." "That there are no liens nor incumbrances upon the said premises or any part thereof, either by mortgage, judgment, or otherwise; that the said property is so situated that a partition thereof cannot be made without great prejudice to the plaintiff, one of the owners thereof." Upon these facts a decree was rendered directing the sale of the entire mine in one parcel, at public auction, to the highest bidder.

From this decree and from the order refusing a new trial the defendant appeals to this Court. Though partition had its origin in the Common Law Courts, it is a subject over which the Courts of Equity assume almost exclusive jurisdiction; and in disposing of the cases for partition the equities of the respective parties growing out of their ownership of the property as tenants in common or otherwise are taken into consideration, and disposed of upon the broad principles which govern those Courts in the administration of justice. As the law deems it against good morals to compel joint owners to hold a thing in common, a decree of partition may always be insisted on as an absolute right. It is not necessarily founded upon any misconduct of the cotenants or part owners. Hence in decreeing a partition the rights and equities of all the parties are respected, and the partition decreed so as to do the least possible injury to the several owners; and "Courts of Equity," says Mr. Storey, "may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of parti-

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tion, so as to prevent any injustice or unavoidable inequality." (Equity Jurisprudence, Sec. 654.) Again, speaking of cases where one of the parties has laid out large sums of money in improvements on the estate, the author says: "Under such circumstances the money so laid out does not in strictness constitute a lien on the estate; yet a Court of Equity will not grant a partition without first directing an accounting, and compelling the party applying for partition to make due compensation. So where one tenant in common has been in the exclusive reception of the rents and profits on a bill for a partition and account, the latter will be decreed." (Id. Sec. 655.) And in Section 656 of the same work it is said: "For in all cases of partition a Court of Equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to the partition; but it founds itself upon its general jurisdiction as a Court of Equity, and administers its relief *ex æquo et bono* according to its own notions of general justice and equity between the parties." Such are the general and just principles governing Courts of Equity in the administration of relief in cases of this character in the absence of statutory regulations. When the statute prescribes a course to be pursued, that course must doubtless be followed so far as it goes, but beyond it the general principles which we have stated should control the action of the Courts.

In decreeing a sale of the mining ground in this case, the Court below seems to have been guided neither by the letter of the statute, nor by those general principles which usually govern the Courts in the absence of statute. A sale of the property should never be decreed except when a partition would result in great prejudice to the respective owners. Such has always been the rule, and Section 708 adopting it declares that "in case of partition of a mining claim any of the tenants in common or joint tenants interested therein may file an affidavit showing to the Court that a sale for cash would be injurious to him, her, or them, the Court shall upon such showing appoint a Commissioner, who shall divide such claim as hereinafter provided for."

The remaining sections describe the manner in which the Commissioner shall proceed, which if correctly followed will, we presume,

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usually result in an equitable partition of the property between the respective owners. When no affidavit is made by any of the part owners the Court might perhaps decree a sale for cash of the entire mine; but when such affidavit is filed, no course can properly be pursued but that prescribed by the statute. The defendant in this case filed a sworn answer, in which it is fully shown to the Court that a sale for cash would be prejudicial to its interests. That such an answer fully meets the requirements of the statute there can scarcely be a doubt. The only object of the law is to require a showing by the party opposing a sale that it would be prejudicial to him. We are not aware that the law attaches any virtue to an affidavit in the ordinary form, which it does not to a sworn answer. The fact is presented upon the oath of the party wishing to avail himself of it. Whether it be shown by affidavit in the usual form or by an answer properly verified is of no consequence. The Court below should therefore have treated the answer as an affidavit, and pursued the course pointed out by those sections of the statute which have been referred to. This Court cannot know how the answer was treated by the parties or the Court below. It is found in the record before us, and in our judgment it answers all the purposes of an affidavit in the ordinary form.

But it is claimed by counsel that as the statute gives no new right, but only furnishes a new remedy, it is not necessary strictly to follow the mode of procedure prescribed by it.

In answer to this position, it is only necessary to refer to the language of Section 708, already alluded to, which, by a fair construction, prohibits a decree for cash when any one of the part owners files an affidavit showing to the Court that such a sale would be injurious to him. When the affidavit is filed, the tenant making it has a right to insist that the partition shall be made as the statute directs. When no objection is made, the Court might decree a sale; but as the law regards the rights of all the interested parties alike, if any of them object to such sale and show in the manner pointed out that it would be prejudicial to them, the statute has marked out a course to be pursued which will doubtless, in a majority of cases, result in an equitable division of the property; and as the language of the statute is mandatory, declaring that "the Court shall upon

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such showing appoint a Commissioner," etc., no other course can properly be pursued. The Court therefore erred in decreeing a sale of the premises.

The appellant also complains that the Court below erred in refusing to allow it to show the amount of money expended by it in developing the mining ground in question, and the value of the improvements placed thereon by it.

We are satisfied from the record, as it is presented to us, that it is unnecessary to determine the general question as to whether compensation will be allowed for developments made or improvements placed on a mine by one tenant in common; because the record in this case shows that the only developments made or work done by the defendant were upon the adjoining claim, which belongs to the defendant exclusively.

However much the developments on that mine might enhance the value of the premises in question, it was only incidental, and therefore the plaintiff could not be held to be responsible for any money expended in such work or development. Had the work been done upon the twenty-five feet of which a partition is here sought, a different and very difficult question would present itself. Hence, all evidence tending to prove the extent of the developments on the defendant's adjoining claim, or the amount of money expended in making such developments, was properly ruled out.

Unless therefore there be developments made or improvements put upon the twenty-five feet in question, the Court below will proceed to divide the mine in the manner pointed out by statute.

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C. W. HOWARD *et al.*, RESPONDENTS, v. JOSEPH D. WINTERS, APPELLANT.

To justify a new trial on the ground of newly discovered evidence, three things must be shown: first, materiality of evidence; second, it could not by due diligence have been produced at the first trial; third, that it is not cumulative.

To justify the granting of a new trial on the ground of newly discovered evidence, the party applying for the relief should show clearly that the failure to produce evidence on the first trial was not the result of negligence on his part.

Per LEWIS, J.—The verdict of a jury or findings by a Court will not be set aside on the ground that they are not supported by the evidence, unless it appears by the statement that all the evidence is before this Court.

The admission by respondents' attorney that a statement on motion for new trial is correct, does not admit such statement to contain all the evidence offered in the case, where the statement itself does not purport to contain it all. It can only be held to be an admission that so far as the evidence is stated, it is stated correctly. It does not negative the idea of other evidence having been given.

Per BEATTY, C. J.—When the particular point on which there is claimed to be a defect of evidence is stated in the motion for a new trial, and an attempt made to state the evidence bearing on this point, and that statement is submitted to the opposite party who either amends or agrees to the statement as made, the Court should give a liberal construction to the statement and presume it contains all that either party considered material in regard to that particular point.

APPEAL from the District Court of the First Judicial District, Storey County, Hon. RICHARD RISING, presiding.

P. H. Clayton, for Appellant, made the following points:

1st. The note purports to have been given by an attorney under a written power. The power itself does not authorize the execution of a note in the name of the principal.

2d. There was no consideration for the note.

Wood & Hillyer, for Respondents.

The note was given as an inducement to get one Beaty, a tenant of appellant, out of a house he was occupying, and therefore was not without consideration. But this Court cannot consider the case on its merits: first, the statement does not contain the grounds of motion for new trial; second, the points now relied on were not raised in the Court below.

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In the *notice* of intention to move for new trial, the grounds on which such motion will be made are not stated. In a paper styled "motion for new trial," certain grounds are set out. If this be a sufficient or proper statement of the grounds, appellant must surely be restricted to the grounds stated in this paper.

The grounds are: first, newly discovered evidence; second, that the power of attorney was not properly acknowledged. The affidavit of Colbath alone refers to the first point. The power of attorney and the certificate of acknowledgment thereto are the only evidences relative to the latter point. Other evidence in the statement was surplusage, it was therefore unnecessary for respondents to offer amendments to the evidence on other points. The statement having been settled only with reference to these two points, it would be unjust to reverse the judgment on other grounds which may appear to be made out by this statement.

Appellant, in reply, urged that the agreement of respondents in this case made the statement on motion for new trial the statement of the case, and should be treated as an admission that it contained everything material to the points made on motion for new trial.

The statement properly construed contains the grounds for the motion: first, newly discovered evidence; second, the insufficiency of the evidence to justify the decision; third, the same is against law and the facts, etc.

Opinion by LEWIS, J., BEATTY, C. J., and JOHNSON J., concurring.

This action is brought to recover a sum of money claimed to be due upon a certain promissory note bearing date September 30th, A.D., 1865, and signed "Joseph D. Winters, by Edward C. Morse." As a defense the defendant Winters pleads: first, that the note was given without consideration; and second, that Edward C. Morse had no authority as his agent to execute it.

The case having been tried without a jury, the Judge below reported the following-as findings of fact:

"First—That on the thirtieth day of September, A.D. 1865, the said defendant, Joseph D. Winters, for value received, did by his duly authorized agent and attorney, Edward C. Morse, at Glen-

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brook, in the County of Ormsby, State of Nevada, make, execute and deliver to the said Edwin C. Morse the promissory note in the complaint set forth, and thereby undertook and promised to pay the said Edward C. Morse, or order, the sum of seven hundred and eight dollars in forty days after date, with interest thereon at the rate of one and one-half per cent. per month; that the said Edward C. Morse was duly authorized and empowered to make, execute, and deliver the said promissory note for and on behalf of said Joseph D. Winters; that afterwards, and before the maturity of said note, the said Morse, for value received, indorsed said note and delivered it so indorsed to plaintiffs, who are now the owners and holders thereof.

"That no portion of either the principal or interest of said note has been paid, and there is now due thereon the sum of seven hundred and eight dollars principal and sixty-seven dollars and fifty-five cents interest."

Upon these findings judgment was given for plaintiffs. A motion for a new trial was afterwards made and refused by the Court below. From the ruling upon that motion and from the final judgment the defendant Winters takes this appeal, and relies upon the following points for a reversal:

First—That a new trial should have been granted upon the showing of evidence discovered after the trial; and

Second—That the evidence does not justify or support the findings of fact.

Section 193 of the Practice Act declares that "The former verdict or other decision may be vacated, and a new trial or rehearing granted, on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party."

The fourth cause enumerated in this section is, "Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial."

Section 194 provides that where newly discovered evidence is the ground upon which the new trial is sought, the application must be made upon affidavit.

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To sustain a motion for new trial upon this ground, it is indispensably necessary to show : first, that the newly discovered evidence is material to the party making the application ; second, that he could not with reasonable diligence have discovered and produced it at the trial ; and third, that it is not cumulative. Applications for new trial upon this ground have been uniformly viewed with jealousy by the Courts, and generally have been granted only upon a very satisfactory showing.

It is for the public good that there be an end to litigation. When therefore, a trial has been had, and a judgment rendered, a second trial should only be granted to further the ends of justice, and not to relieve litigants from the consequences of their own laches, thoughtlessness or neglect. The law demands of the parties all reasonable diligence and caution in preparing for trial, and furnishes no relief for the hardships resulting from inexcusable neglect or want of diligence. When therefore a new trial is sought because of newly discovered evidence, it should most certainly be shown by the party making the application that his failure to produce such evidence at the first trial was not the result of any negligence upon his part. Of that fact the Court should be perfectly satisfied. To grant new trials upon this ground, where no such showing is made, would simply be giving encouragement to negligence, and judicial approval to inexcusable carelessness.

The appellant in this case made no such showing by the affidavit of Colbath. That affidavit simply shows the following facts : That Colbath, who seems to have been a part owner with the defendant Winters in the Glenbrook House, had a settlement with the tenant Beaty long prior to the giving of the note sued on in this case ; that upon that settlement it was found that Beaty was indebted to Winters and Colbath in the sum of one hundred dollars, for which he gave his note, and that he, Colbath, had not prior to the trial informed Winters of such settlement. This evidence is supposed to be material, because tending to show that Winters and Colbath were not indebted to Beaty, and hence that there was no consideration for this note, which was given to secure an indebtedness which Beaty owed to the plaintiffs.

But testimony tending to show that the defendant was not

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indebted to Beaty would simply be cumulative. That Winters was not indebted to Beaty at the time this note was given seems hardly to have been disputed at the trial. Beaty testified that nothing was due him, and Winters also swore to the same fact. But the plaintiffs did not seem to rely upon such indebtedness as a consideration. Their agent testifies that the consideration was the surrender of the house by Beaty to Winters. Clearly, therefore, Colbath's testimony is simply cumulative, and when such is the case a new trial will not be granted. (*Gray v. Harrison*, 1 Nev. 502.) Even if it be not cumulative, the appellant made no showing that he had used any diligence whatever to secure Colbath's testimony; nor indeed is there anything in the record to show that Winters did not know at the time of the trial of the settlement between Colbath and Beaty. True, Colbath swears that he did not inform Winters of that fact until after the trial, but he may have learned it by simply consulting his own books of account, or inquiring of his tenant. If the appellant did not know of the settlement at the time of the trial he could surely have made some showing to that effect. His own affidavit should if possible have been obtained. That the evidence was discovered after the first trial, and that the appellant was not chargeable with inexcusable negligence, is not by any means made out. The party applying for a new trial on the ground of newly discovered evidence must make his vigilance apparent; for if it is even doubtful that he knew of the evidence, or that he might but for negligence have known and produced it, he will not succeed in his application. (1 *Graham & Waterman on New Trials*, 473; *Baker v. Joseph*, 16 Cal. 173.)

Upon the second point also our conclusion is adverse to the appellant. We have heretofore held that we will not set aside the findings of the lower Court, or the verdict of a jury, upon the ground that they are not justified or supported by the evidence, unless it be shown that all the material evidence is before us. (See *State v. Bonds*, 2 Nev. 265.) The stipulation by counsel that the statement is correct, cannot be tortured into an admission that it contains all the testimony when no such fact appears in the statement itself. The stipulation of counsel goes no farther than to admit that all the testimony which is set out in the statement is correctly stated. The

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statement purports to give the testimony of three or four of the witnesses who were sworn at the trial. Whether all their evidence is given or not, or whether they were all the witnesses who testified in the case, does not appear. An admission therefore by counsel that the statement is correct is surely no admission that no other witnesses were sworn, or that the record contains all that was sworn to by those mentioned. In agreeing that a statement is correct, counsel admits nothing beyond that which is set out in the statement itself. Had it been affirmed in the statement that it contained all the evidence, a stipulation that the statement was correct would of course be an admission of the fact that it contained all the evidence.

It is urged by counsel however, that it is only necessary to set out so much of the evidence as is necessary to explain the points taken upon appeal. Very true. But to enable this Court intelligently to pass upon the question whether the findings or verdict are sustained by the evidence, it is necessary that it have all the material evidence before it.

The transcript does not purport to contain it. The presumption is therefore in favor of the regularity of the findings of the judgment of the Court below.

Judgment affirmed.

Opinion by BEATTY, C. J.

I fully concur in the foregoing opinion so far as it relates to the question of newly discovered evidence.

I also reluctantly concur in the conclusions arrived at in the latter part of the opinion. But whilst I concur in the result, I wish to say that I think the language contained in the following sentence is too broad, and may hereafter lead to difficulties and embarrassment on the part of both Court and counsel. The sentence to which I allude is as follows: "We have heretofore held that we will not set aside the findings of the lower Court, or the verdict of a jury, upon the ground that they are not justified or supported by the evidence, unless it be shown that all the material evidence is before us." (See *State v. Bonds*, 2 Nev. 265.)

In the case of the *State v. Bonds*, although the language is used

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“to justify an appellate Court in setting aside a verdict upon the ground of insufficiency of the evidence, the record which is presented to it must purport to embody all the material evidence adduced on the trial.” Yet the case in fact went off on the ground, among others, that the record did contain evidence sufficient to justify the verdict; so this first sentence contained a mere dictum not important in the decision of that case.

Our statute, Section 195 of Practice Act, requires a party desirous of a new trial to give notice to the opposite party within two days after the trial of his intention to move for the same; and if intending to rely on affidavits, to file the same within five days after notice of intention to move is served. If the moving party intends to rely on a statement, he shall within the same period make “a statement of the grounds on which he intends to rely.” * * * “The statement shall contain so much of the evidence or reference thereto as may be necessary to explain the grounds taken, and no more. Such statement, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be settled by the Judge upon notice.”

This statute seems simple enough; one would think it might be followed without difficulty; but every day's experience shows us that cases are frequently brought before this Court where it is a question of great difficulty to determine what we may review and what we are excluded from reviewing, by the want of a proper statement. Generally, a party moving for a new trial on the ground that the evidence does not support the verdict or finding of the Court, can without difficulty point out the particular branch of the case in which he thinks the evidence is defective.

Having pointed out the particular defect complained of, he should then say that all the evidence in regard to this point was as follows: giving the oral testimony of the witnesses on the particular point or points, and also referring to such documentary evidence as has any relation to the point; or if there is an entire absence of proof, the statement may simply show that no evidence was introduced in relation to a certain point in the case. Whilst it would be far better that the statement should distinctly show that all the evidence relating to the point relied on for a new trial was contained in the record,

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yet as this statement has to be submitted to the opposite party, and finally settled by the Court if not agreed to, I think a liberal construction should be put upon it; and if this Court can see that the point to be relied on has been fairly stated, and an attempt made to state the evidence bearing on that point, and especially where amendments have been made by the opposite party, or the statement agreed to as correct, it should conclude that everything material to the point was contained in the record, although there may be no statement that it contains all the evidence, or all the evidence relating to the point relied on.

The presumption is, that the party wishing to sustain the verdict will insert whatever is deemed material for his side of the case. But perhaps this liberal construction should only be indulged in where the statement shows distinctly the points to be relied on, and thereby gives the opposite party a fair chance to make such emendations as may be proper fairly to present his side of the case.

The statement in this case shows only two grounds to be relied on by appellant: First, newly discovered evidence; and second, "the insufficiency of the evidence to justify the decision, and that the same is against the law and facts, upon the ground that the power of attorney was never duly acknowledged."

Now it appears to me, by any fair interpretation of this second point, it can only be held to raise the objection that the evidence was insufficient to support the findings, because of the want of a proper acknowledgment to the power of attorney. If such is the proper interpretation of this objection, then nearly all the statement was surplusage, and it was not necessary for respondents to insert in the statement other evidence, which would have been only incumbering the record with more irrelevant matter. The evidence should be confined to the point made. The appellant, however, contends that this objection should be treated as if it contained two distinct sentences, the first of which would read as follows: "The insufficiency of the evidence to justify the decision." As the sentence is written in the transcript, I think it will hardly bear such a division. If it did, I should say the statement of the evidence was sufficient to support this point. The statement contains first, the evidence of certain witnesses called by plaintiffs as to the circumstances under

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which the note was executed ; then the testimony of certain witnesses called by defendants as to the same circumstances. The testimony of both sets of witnesses shows conclusively and without contradiction among themselves that the note was executed in the name of defendant by one Edward C. Morse ; that Morse, at the time he executed the note, had no power from Winters to execute the same ; and that there was not a shadow of consideration for the note. Respondents stipulated that the statement filed by appellants " shall be used as the agreed statement on motion for a new trial in the cause."

Had the statement fairly raised the point that the evidence was insufficient to support the finding, then I should have held that this stipulation not only admitted the witnesses named had sworn as stated, but that there was no other material evidence on the same subject which could have benefited respondents by being introduced into the record. But as the statement of the ground on which the appellants intended to rely was so vague and uncertain—so well-calculated to mislead and deceive the respondents—I am compelled to acquiesce in the affirmance of the judgment, although it seems highly probable that it is erroneous.

Keys v. Grannis.

L. KEYS, RESPONDENT, v. CHARLES A. GRANNIS,
APPELLANT.

Where property is taken from the possession of a stranger to the suit, who claims title by means of purchase from the defendant in such process, and such sale is valid and good between the parties to it, but void only as to creditors, the officer can justify the taking in such case only by showing that he represented a creditor, and that the writ under which he seized that property was regularly issued. As a general rule, process regular on its face and issued by a tribunal or officer having authority to issue it, is sufficient to protect the officer, although it may have been wrongfully issued. But when the officer attempts to overthrow a sale by the debtor, on the ground that it was fraudulent as to creditors, he must go back of his process and show the authority for issuing it.

If however the sale by the debtor were simply colorable, or only a transfer of the possession merely for concealment, with no intention of transferring the title, the writ alone, if regular on its face and emanating from a tribunal having jurisdiction of the subject matter, will be a full protection to the officer—an action by one so holding possession of the debtor's property.

*In pleading the judgment or other determination of a Court of limited jurisdiction, it is made necessary by the Practice Act of this State to allege that such judgment or determination was duly given or made.

Without such allegation in the pleading, proof of the judgment or proceedings of such Court would be inadmissible.

Per JOHNSON, J., dissenting.

An objection to the introduction of evidence should specify specifically the ground of objection; therefore, objecting to the introduction of evidence upon the general ground of irrelevancy, in that it is inadmissible under the pleadings, is not sufficiently specific.

APPEAL from the District Court of the Third Judicial District, Washoe County, Hon. C. N. HARRIS, Judge.

Geo. A. Nourse, for Appellant.

Wallace & Flack, for Respondent.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

The complaint charges the defendant in this action with having wrongfully and unlawfully seized and converted certain chattel property belonging to the plaintiff, valued at seven hundred and thirty-two dollars, and that thereby he the plaintiff was damaged in the sum of one thousand dollars, for which sum judgment is asked.

The defendant first denies unqualifiedly all the material allegations of the complaint, and then by way of justification avers that at the time of the alleged taking, the property claimed by plaintiff belonged to one Jerome W. Coffin: "That under and by virtue of a certain writ of attachment, issued on the seventh day of November, A.D. 1866, by the Justice of Peace of District No. 3, Washoe County, Nevada, directed to him the said defendant, then constable of District No. 3 aforesaid, commanding him the said defendant to attach the property of the said Coffin, and safely to keep the same; he the said defendant, constable as aforesaid, did upon the seventh day of November, A.D. 1866, in the County of Washoe aforesaid, levy upon and attach the same chattel property described by the said plaintiff, and so continued to hold the same up to the time of sale thereof as hereinafter set forth." It is further alleged that the property was afterwards sold under an execution issued from the said Court, but the defendant did not introduce the execution in evidence, nor rely upon it as a justification for the taking. This very singular pleading concludes with an allegation that the property in question was fraudulently transferred by Coffin, and taken by the plaintiff for the purpose of defrauding the creditors of the former.

Upon the trial the plaintiff proved in opening his case that he was in possession of the property at the time it was seized by the defendant; that he had purchased it from Jerome W. Coffin, paying him a valuable consideration therefor; that the defendant had taken it from his possession, and upon demand being made refused to return it; and also that the property was worth the sum of seven hundred and eighty dollars, thus making out a *prima facie* case against the defendant. The defendant therefore sought to justify the taking under a writ of attachment issued by a Justice of the Peace, the plaintiff objecting to the introduction in evidence of the papers and the record of proceedings in the case in which the writ was issued, urging among other objections that the answer was not sufficient to authorize their introduction; because it did not show that the Justice who issued the writ had authority to do so.

The Court below ruled out all the papers and the writ under which the defendant sought to justify. This ruling it is claimed is

erroneous, and is the principal ground relied on in this Court for a reversal of the judgment.

The first question presented for discussion in the case thus brought before this Court is: whether the papers offered in evidence by the defendant and rejected by the Court were necessary to establish his justification. If so, the inquiry as to whether the answer is sufficient to authorize their admission in evidence will then be a pertinent question for consideration.

That it was necessary at least to produce the writ under which the property was seized, and to show that the Justice had authority to issue it, we are fully convinced; whether it was necessary to go beyond that and show that the writ was regularly issued, depended entirely upon the character of the plaintiff's interest in or right to the property sought to be recovered by him.

When property is taken from the possession of a stranger to the writ, who claims title by means of purchase from the defendant in such process, and sale is valid and good between the parties to it, but void only as to creditors, the officer can justify the taking in such case only by showing that he represented a creditor, and that the writ under which he seized the property was regularly issued.

As a general rule, process regular on its face and issued by a tribunal or officer having authority to issue it, is sufficient to protect the officer, although it may have been irregularly issued. But when the officer attempts to overthrow a sale by the debtor on the ground that it was fraudulent as to creditors, he must go back of his process, and show the authority for issuing it. If he act under an execution, he must show a judgment; and if he seizes under an attachment he must show the attachment regularly issued. (*Noble et al. v. Eastman*, 5 Hill. 195; *Thornburg v. Hand*, 7 Cal. 554.)

If however the sale by the debtor were simply colorable, or only a transfer of the possession merely for concealment, with no intention of transferring the title, the writ alone, if regular on its face and emanating from a tribunal having jurisdiction of the subject matter, will be a full protection to the officer in an action by one so holding possession of the debtor's property. (3 Starkie on Evidence, 1355; also *Thornburg v. Hand*, *supra*.)

To justify himself in any case whatever, therefore, the officer

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must establish two facts: first, that his writ is regular on its face; and second, that the Court had authority to issue it. If the process issues from a Court of general jurisdiction, the authority to issue it would be presumed; but if from a tribunal or officer of special and limited powers, the authority must be shown by the officer.

And now as to the admissibility of the evidence offered by the defendant in justification of the taking and detention of the property in question.

As there is no presumption in favor of the authority or the regularity of the proceedings of Courts or officers of special and limited jurisdiction, it was formerly necessary, in pleading their judgments or orders, to show that they had jurisdiction, and that their proceedings were regular.

This common law rule of pleading is however very greatly modified in this State by Section 59 of the Practice Act, which declares that "in pleading a judgment or other determination of a Court or officer of special jurisdiction, it shall not be necessary to state the facts conferring the jurisdiction; but such judgment or determination may be stated to have been *duly* given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction."

As this section dispenses with very much that was required by the Common Law rule, and specifies what shall be sufficient as a substitute for it, that substitute ought, it would seem, to be strictly followed.

The allegation that the judgment or determination was *duly* given or made is a substitute for the lengthy and minute statement of the jurisdictional facts which were formerly required. To show the jurisdiction is as necessary under our practice as it ever was, the only change being in the manner of stating it. That the judgment was *duly given or made* is a concise mode of stating that the Court or officer had the proper jurisdiction, and that the judgment was regular, otherwise it would not be *duly made or given*.

Section 59 of the Practice Act is a liberal copy of Section 161 of the New York code of procedure, under which it has been held that in pleading the judgments of such Courts or officers it is abso-

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lutely necessary to allege that they were *duly rendered* or made. "The word entered or perfected," says Mr. Justice Smith in delivering the opinion of the Court in *Hunt v. Dutcher*, 13 How. P. R. 538, "may be equivalent to the word 'made or given'; but the word *duly* is most essential. It can hardly be dispensed with and satisfy the terms of the statute. I can imagine no single word that will supply its place."

In the answer in this case there is nothing whatever from which it can be ascertained whether the Justice had jurisdiction of the subject matter or not. The action in which the writ was issued may have been brought to recover a sum of money far beyond his jurisdiction; and for aught we know, the writ may have shown such to be the case. If so, it would be no protection to the officer. As we have before stated, the process, to be a protection to him in any case, must be regular on its face, and must emanate from a Court or officer having jurisdiction of the subject matter.

If it appeared by the writ under which the defendant sought to justify that it was issued in an action brought to recover over three hundred dollars, which is the limit of a Justice's jurisdiction, the defendant would not be compelled to execute it, and it would not justify any act of his under it. (See *McMurty v. Henry*, 4 Bibb. 410.)

The mere allegation, therefore, that he seized the property under a writ of attachment by a Justice of the Peace, without showing in some way that the Justice had authority to issue the writ, is not sufficient to constitute a justification to the officer. Had the writ issued from a Court of general jurisdiction, the authority would be presumed; but no such presumption can be invoked in aid of the defendant's answer in this case. The presumption, if any can be entertained, would be against such authority. The defense of justification not having been pleaded, could not properly be proven, for the evidence must correspond with the allegations, and be confined to the material points in issue.

The allegation that the property in question was seized under a writ of attachment was immaterial, and hence no issue could properly be joined upon it.

The Court below did not therefore err in rejecting the writ and

papers in the case of *Surtévant v. Coffin*. It would have been much the better practice, however, to have suggested an amendment of the answer, and allow it at once, unless the rights of the other party would have been prejudiced thereby.

Judgment affirmed.

Dissenting Opinion of JOHNSON, J.

It is questionable whether we ought to consider this case on the statement at all, in the shape it is presented to us. The manner of preparing statements, and of transcripts on appeal, is so well defined by statute and rules of Court, as need excuse no attorney or clerk for bringing up a record in the shape we find this to be. We have defendant's statement on motion for a new trial, and plaintiffs' amendments thereto set out in different parts of the transcript.

As a fact, it does not appear of record that the statement was ever agreed to by counsel or settled by the Judge. But counsel for either party in their briefs agree in treating the original, with the proposed amendments of plaintiff, as the statement used in such motion. The appeal was not heard on oral argument, but was submitted on briefs by consent of counsel, so that the imperfections of the record were not disclosed to the view of the Court, until some time after its submission; otherwise I should have wanted the statement properly engrossed, so that we would not have to search out from the confused mass what in reality were the facts and questions arising upon the trial and motion in the lower Court. Under the circumstances we must consider the statement in the same sense in which it was treated by counsel, notwithstanding it imposes on the Court a most ungracious task.

I agree with Justice Lewis, and upon that point he undoubtedly states the law correctly, that "the answer was insufficient to admit of proof in justification of the acts of the officer in taking and detaining the chattels, *provided* the plaintiff had made the proper objections to it."

The question then is, were these objections properly taken? There are two methods by which the sufficiency of the answer could have been tested: First, by demurrer, and second by properly objecting to the evidence offered by defendant. No demurrer was

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interposed; but on the trial when the proof was tendered, plaintiff made certain objections to their admission, which Justice Lewis understands to be, "among other objections that the answer was not sufficient to authorize their introduction, *because it did not show that the Justice who issued the writ had authority to do so.*"

That part of the opinion I have quoted in italics is the only matter on which we differ materially, and as I view it, makes all possible difference; for if I consider them in the light which my associate does, I would not hesitate to concur in affirming the judgment of the lower Court.

Let us see what these objections really are, and whether they do in fact raise the question of the Justice's authority to issue the writ. I quote from the transcript:

"F. H. Burroughs was then called, and sworn as a witness on the part of the defendant, and testified substantially as follows: I am Justice of the Peace in and for this precinct. I have been ever since October, 1866. This is my docket as such Justice; these are the files of papers in my Court, in an action brought therein by one J. H. Sturtevant as plaintiff, against one J. W. Coffin as defendant. Defendant then offered the docket and files in evidence. Counsel for plaintiff objected on following grounds: First, the answer is insufficient to authorize the introduction of such papers; second, the docket offered is not kept according to the statutes; third, the affidavit for publication is insufficient; fourth, that the original summons issued, notified the defendant to appear on the twelfth of November, A.D. 1866, and the published summons required the defendant to appear on the third of December thereafter; fifth, the docket does not show on what day the summons and attachment was issued; sixth, the account shows that it was filed one day after the commencement of the suit; seventh, the affidavit of the printer of the publication of summons is insufficient; eighth, the affidavit on attachment, and justification of sureties on the undertaking for an attachment were not sworn to before any officer known to the law.

"A copy of the entries in the said docket is hereto annexed marked "Exhibit D," also, a copy of bill of account of J. H. Sturtevant against J. W. Coffin for the sum of two hundred and eighty-nine

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dollars and eighty-five cents is hereto annexed, marked "Exhibit E;" also, copy of summons issued from Justice's Court, F. H. Burroughs, Justice of the Peace in aforesaid action, *J. H. Sturtevant v. J. W. Coffin*, marked "Exhibit F;" also, copy of affidavit for publication of summons marked "Exhibit G;" also, affidavit for writ of attachment marked "Exhibit H;" also, undertaking on said writ, marked "Exhibit K;" also, writ of attachment marked "Exhibit L," all of which are made part of this statement.

"The counsel for defendant then offered to show by the oral testimony of the Justice, F. H. Burroughs, that the bill aforesaid was actually filed with said Justice on the seventh day of November, instead of November 8th, as entered in his docket, and that said date was erroneously entered by mistake. The plaintiff by his counsel objects on the ground that such evidence is inadmissible to vacate, or disprove record evidence; objection sustained, and defendant by his counsel excepts; defendant then withdraws offer of files of Justice in evidence, and offers first, writ of attachment "Exhibit H;" objected by plaintiff's counsel, because not shown to have been issued in action properly commenced, or by Court having jurisdiction; objection sustained, and defendant by his counsel excepts. Witness (Burroughs) then testifies: This is my docket, and the record of the case of *Sturtevant v. Coffin* is on pages 74 and 75. Witness is asked by defendant's counsel: Is this a correct record of the proceedings in that case? Plaintiff objects on the ground that a record is a verity, and no proof can be introduced to sustain it; objection sustained; defendant excepted.

"C. A. Grannis was then called as a witness on the part of the defendant, and testified in substance as follows: On November 7th, 1866, I was constable of this precinct, and acting as such, and this is my signature to the return on the writ of attachment. The writ was then offered in evidence; objected to by plaintiff: First, because there was no proof that the suit had been commenced; second, it is not shown that any complaint, bond, note, bill or account had been filed, or any affidavit or undertaking as required by law had been filed before said writ was issued, and enumerated all the objections anew that were made when these papers were offered in evidence; and third, that the summons was defective on its face, in that it did not

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notify the defendant of the nature of the demand. The defendant then offered the Justice's docket, and an account filed in the case of *Sturtevant v. Coffin*, the same as heretofore on this day offered in evidence and withdrawn by defendant. The plaintiff's counsel objected to the introduction of said paper in evidence on all the grounds mentioned when they were first introduced, and also on the following additional grounds: First, that the docket had been changed since its withdrawal, this morning; and second, that the date of the filing of the account had also been changed since the withdrawal. The Court sustained the objection, and defendant excepts, and plaintiff's counsel offered to prove by other witnesses, that such changes above mentioned in the Justice's docket and the filing of the account, were made after said papers were first introduced in evidence in this case and withdrawn."

These portions of the transcript, copied from the statement as amended, give *in full* the objections taken at the trial by plaintiff; and certainly cannot be considered as covering the question now under consideration.

When the writ of attachment was offered in evidence, if the plaintiff wished to object on the grounds that "the complaint did not show that the Justice who issued it had authority to do so," the point of objection should have been particularly set forth, so that upon the objection stated the Court could act understandingly, and the opposite party be afforded an opportunity of curing the defect by an amendment to the answer.

As the matter is shown to us, if the point was more fully stated to the Court or brought to the knowledge of the opposite party, it must have been on the argument of the objections, which is no part of the record here, nor was it in the lower Court sufficient to justify its ruling in rejecting the evidence.

In respect to such objections, our statute is explicit. (See Secs. 188-190, Practice Act.)

"To entitle an objection to notice," says Justice Field, or the Court, "it must not only be on a material matter, affecting the substantial rights of the parties, but its point must be particularly stated. This is not only a statutory regulation, but it is the uniform rule, so far as we are aware of, in all the Courts of Record. The

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party, as the authorities say, must lay his finger on the point of his objection to the admission or exclusion of evidence." (*Kite v. Kimball*, 10 Cal. 277, and affirmed in *Martin v. Travers*, 12 Cal. 244, and authorities there cited; *Dreux v. Domac*, 18 Cal. 83; *Leet v. Wilson et al.*, 24 Cal. 398.)

Other questions are discussed by counsel in their briefs. Such as relate to the execution are not relied upon by counsel for appellant, and therefore are not before us.

As to the remaining points, perhaps it is not necessary to consider them in detail.

The District Court below in excluding the evidence offered by defendant, (I refer to proceedings under the attachment) was undoubtedly influenced by the same consideration which respondents' counsel has urged here—that of the want of proper averments in the answer. Whilst apparently excluding it, some portions of this evidence were disallowed on other and distinct grounds, which are purely technical, and could not be sustained.

I think the order and judgment of the Court below should be reversed, and a new trial granted.

W. L. PERKINS ET AL., RESPONDENTS, v. S. C. BARNES,
APPELLANT.

In an action of replevin it is not indispensably necessary to show a demand upon the defendant to return the property before suit brought. A demand serves no purpose, except to establish a conversion or a wrongful detention. When that can be established without showing a demand, a demand is unnecessary—Justice JOHNSON dissenting.

When, therefore, the defendant in his answer admits the detention and claims title in himself, the title alone is put in issue, and no demand need be shown—Justice JOHNSON dissenting.

APPEAL from the District Court of the First Judicial District,
Hon. RICHARD RISING, Judge.

The facts sufficiently appear in the opinion of the Court.

Mesick & Seely, for Appellant.

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Pitzer & Keyser, for Respondents.

Opinion by LEWIS, J., BEATTY, C. J., concurring.

The plaintiffs bring this action to recover possession of certain personal property, which they allege is wrongfully detained from them by defendant.

The answer denies the plaintiff's title and right of possession, admits the detention, but denies that such detention is wrongful ; it is then alleged that the defendant is the owner, and entitled to the possession of the property.

Upon these pleadings, the case was tried without a jury, the Judge below finding the facts and rendering judgment thereon in favor of the plaintiffs. From this judgment the defendant appeals, claiming that it should be reversed on the following finding : " That the defendant came into possession of said property by purchasing the same for value of one Lamphier, who had obtained possession thereof of plaintiff's agent through fraud and misrepresentation, which was not however known to the defendant. That no demand of possession of the property had been made of defendant by the plaintiffs before the commencement of the action."

It is urged by counsel for appellant that as the findings of fact show no tortious taking, but simply a wrongful detention of the property sought to be recovered, it was necessary for the plaintiff, before he could properly recover, to show that he demanded a delivery of the property from defendant. Whether such a demand was necessary before suit brought, is the only question to be determined upon this appeal. It has sometimes been said that when one has acquired rightful possession of property, an action of replevin cannot be maintained against him to recover it until demand by the owner, and a refusal.

But if there be a tortious taking, it is conceded no such demand is necessary. (*Galvin v. Bacon*, 11 Maine, 28 ; 4 Greenleaf, 306.) Indeed, it was formerly held that the action of replevin could only be maintained where there was an unlawful or tortious taking ; but it is now settled beyond all question that it may be brought to recover property unlawfully detained ; and so, under the Practice

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Act of this State, property unlawfully detained may be recovered in an action analogous to the common law action of replevin.

But why is a demand upon the defendant to return the property necessary? If it be necessary at all, it is simply for the purpose of evidence, and nothing more. If the defendant rightfully obtained possession of the property, that possession does not, it is said, become unlawful until demand is made by the owner. Such doubtless may often be the case, nevertheless the *wrongful detention* is the material and issuable fact. When it is shown that the owner delivered the possession of his property to an agent or bailee, the presumption would of course be that he held the possession subject to the will of the owner, until some fact is shown inconsistent with such presumption.

Our method of rebutting such presumption is by proving that the owner demanded the property, and that the defendant refused to deliver it. It is not however by any means the only method. But whether it be or not, the unlawful detention and not the demand is the ultimate and material fact to be established. Under our practice, the plaintiff makes out a case when he shows property or right of possession in himself, and an unauthorized detention by the defendant.

If he can establish these facts without showing a demand, why is his case not made out? We know of no well-considered case where it has been held necessary to plead a demand. Hence it does not seem to be considered a fact necessary to perfect the plaintiff's right of action. If the demand be necessary to complete his right, it should surely be pleaded; and an omission of such an allegation from the complaint would make it demurable.

We conclude, therefore, that a demand serves no purpose beyond that of showing that the detention is unlawful, and where that can be shown in any other way, it is unnecessary to prove a demand.

In this case, even admitting the defendant's possession to have been lawful, his answer rendered it unnecessary for the plaintiff to prove a demand; because the only issue raised by the pleadings is upon the title and the value of the property, the defendant admitting the detention and justifying by claiming title and right of possession in himself. Upon these pleadings clearly it was only

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necessary for the plaintiff to show that he was the owner, and entitled to the immediate possession of the property. That being established, the presumption would be that the detention would be wrongful.

He certainly could not be compelled to establish anything beyond these issuable facts.

Why then should the fact that no demand had been made by the plaintiff defeat his right of recovery? It was held in the case of *Seaver v. Dingley*, 4 Greenleaf, 306, that in replevin of goods, the original taking of which by the defendant was lawful if he plead property in himself, it is not necessary for the plaintiff to prove a demand for the goods previous to the bringing of suit.

That case is directly in point, and fully sustains our conclusion upon this question.

Judgment affirmed.

Dissenting Opinion of JOHNSON, J.

Aside from the pecuniary interests of the parties to this proceeding, additional importance attaches to a decision of the appeal, as a ruling on the law points in the case must to some extent control the action of our Courts in future proceedings of like character, seeing that this Court has not before passed upon the questions now brought up. My first impressions, upon examining the transcript of the case, were opposed to the judgment of the Court below; but desiring in this as in all other matters coming before us to defer to the views of my more learned and experienced associates, when not positively in conflict with a different understanding and sense of duty, I would not allow these first impressions to assume the form of an opinion until after a more mature consideration of the questions, with such aid as the authorities we have could furnish. These examinations lead me to a different conclusion from that expressed in the opinion of the other Judges.

In the first place, let us look at the pleadings in the case. The complaint sets up that plaintiffs are the owners of and entitled to the possession of the property, (describing it) that defendants wrongfully detain it, and the same is of the value of fifteen hundred dollars; with the usual prayer for an alternative judgment for the property or its value.

Defendant answering, denies the ownership or right of possession of plaintiffs or either of them to any part of the property; denies that he wrongfully detains it or any part thereof, and that it is not of a value exceeding seven hundred and fifty dollars.

These pleadings show that this was merely a statutory action, and governed by Chap. 2, Acts 1861, p. 329, under the distinctive form of a *claim for delivery of personal property*, between which and the common law remedy of *replevin* there is but a faint resemblance. In our proceeding, the action is founded on *detention*; but I think it would be a fruitless task to attempt to find a common law authority asserting the same rule in reference to *replevin*. It is not important, therefore I shall not stop to discuss the properties of the suit or proceeding in *replevin*, as it was originally employed at common law and afterwards extended by British statutes, more than to suggest this: that the authorities, Blackstone in his Commentaries, Chitty on Pleading, Stephens' *Nisi Prius*, Gilbert on Replevin, all agree in the proposition contained in Bacon's Abridgment, VIII, p. 525: "The common law action of *replevin* does not lie unless there has been a *tortious taking*." And I conclude therefore that when the contrary is claimed, as apparently it is, in the opinion of Justice Lewis, it only refers to the action of *replevin* as established by statute in certain States, and which is necessarily governed by the provisions of such statutes.

I have stated already that our proceeding bears but little resemblance to the common law action of *replevin*; on the contrary, "claim and delivery of personal property," considered as a remedy, is much like the action of *detinue* at common law, it being the only remedy by suit at law for the recovery of personal chattels, except in those instances where the party could maintain *replevin*; and although it was generally held that *detinue* would lie when the defendant took the goods or chattels *tortiously*, (as in *replevin*) yet the gist of such an action was the detention, and not the *taking*. Furthermore the judgment in *detinue* was in the alternative that the plaintiff recover the goods, or the value thereof if he cannot have the goods themselves, and his damages for the detention and the costs of suit.

It needs no force of illustration to show the striking similitude

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between that form of action and our statutory remedy, but when we look at the question as it stood before the days of the code—influenced and controlled by legislation and decisions of Courts in the United States—from an early day we find but few cases where the distinction was kept up between *replevin* and *detinue*, but they became blended under the one common name of *replevin*. In New York, by the Revised Statutes of 1830, an action of *replevin* could be brought for goods or chattels wrongfully distrained or otherwise wrongfully detained. (2 R. I. 764.) Moreover the action of the *detinue* was expressly abolished by the same law. (Id. 764.) The proceeding was in the *cepit* or *detinet*, according to the facts of the case, whether for a wrongful *distrain* or *taking*, or for a wrongful detention, as it might be. The pleas and defenses in such action were also regulated by the statute. (Id. 765.)

In a number of cases following the adoption of this statute, the Courts there held in effect, that “although goods have been tortiously taken, a *bona fide* purchaser under a wrong doer is not answerable to the owner until after demand and refusal.” (*Barrett v. Warren*, 3 Hill, 348; *Pierce, Administrator v. Van Dyke*, 6 Hill, 613; *Millsbaugh v. Mitchell*, 8 Barb. 333.)

In the first of these cases Judge Bronson, in the course of his opinion, says: “A man who innocently purchases property, supposing he should acquire a good title, ought not to be subjected to an action until he has an opportunity to restore the goods to the true owner;” a reason founded on the most correct principles of justice.

Since the action of *replevin*, as adopted by the statute to which I have referred, has been superseded by the provisions of the code, and as a substitute therefor, in that State a like rule has obtained in their Courts. (*Hunter et al. v. Hudson River I. & M. Co.*, 20 Barb. 493; *Tallman et al. v. Turck*, 26 Barb. 167; *Gurney v. Kenny*, 2 E. D. Smith, 132.)

The last was a very extreme case; the defendant's wife came into possession of stolen goods, knowing them to be such. Action was brought against the husband. Says the Court: “Where one is found in possession of goods which belong to another, or where he is sought to be held liable as in this case, constructively, on account of the possession of another without knowledge of him of any tortuous act

having been committed, a demand and refusal are necessary before an action can be maintained for the goods. He should have had an opportunity afforded him by a demand to return the *same* before he could be held responsible for a conversion of them."

In California the necessity of a demand and refusal before commencement of action seems to be recognized in *Daumiel v. Gorham*, 6 Cal. 43; *Taylor v. Seymour et al.*, Id. 512; *Riley v. Scannell*, 12 Cal. 73. In the latter case there was no allegation in the complaint, nor was there proof of demand of the property prior to the bringing of the action, and so far as I can discover the decision may have been grounded on either of these defects.

On this point I think the weight of authority observes this distinction, that if the action be against the *tort feasor*, or one in possession of chattels *mala fides*, no previous demand is necessary; but where such action is against an innocent purchaser or holder, such a demand is indispensable.

The main cases cited by Justice Lewis are seemingly opposed to this; indeed the rule is quite broadly stated, that in the action of *replevin* as known to the statutes of that State, no previous demand for the property in any case is needed, although upon a careful examination of the first of these cases (4 Greenleaf, 306) it will be observed that the decision *need not* depend on the question of demand; for the findings of fact by the jury showed that Reed, claiming to have purchased the goods of plaintiff, by means of his fraud and falsehood, and that by fraudulent management, Dingley, the defendant, procured the goods from Reed: a state of facts widely different from the condition we find them in this case. The facts then fully sustained the ruling of the Court on the question of demand, even if tested by the rule above stated. It is true the other and later case, *Galvin v. Bacon*, distinctly holds that demand is not necessary, yet I am unwilling to accept it as the law when I find the contrary, and what seems to me the juster rule, fortified by authority as I have shown, and maintained upon a principle and with a reasoning which is positively unanswerable.

If my conclusions on the first point be correct—that demand must be made in a case like this—then it necessarily follows that such a demand must be pleaded.

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A complaint under our system of pleading must contain a statement of the *facts* constituting the cause of action. Under the statute a mere *detention* of property will not support the action, but the detention must be wrongful. Whether the detention is *rightful* or *wrongful* depends on the circumstances of the particular case, and must be shown by the complaint. As for instance: if the defendant *wrongfully took* the property, this is a fact to be stated, as *prima facie* the detention is wrongful. But if the party has come into possession of it under circumstances like the present, a refusal to deliver on demand of the party rightfully entitled to its possession makes a further detention *wrongful*; and such demand and refusal are material facts to be shown by proof, and necessary to be stated in the complaint. If a *wrongful detention* is evidenced by alleging that the party *wrongfully detains*, it is merely showing a fact by the statement of a legal conclusion, which is not permitted under our practice. "Facts and not conclusions of law must be stated." This view of the matter is furthermore strengthened by reference to the affidavit required in such cases. Where a delivery is claimed, an affidavit shall be made * * * showing * * * 2d, that the property is *wrongfully detained* by the defendant." Not simply a statement that the party "wrongfully detains," but showing it by a statement of the facts which makes such detention wrongful.

Van Santvoord thus states the law under the code, as settled in New York. In respect to the demand for the goods and refusal of the defendant to deliver the same, these should be alleged whenever proof of them is necessary to sustain the action. Thus in an action against a bailee who has come lawfully into possession of personal property, the complaint shall aver a demand of the goods and refusal, or allege that the defendant has sold or destroyed the property, which is equivalent to a wrongful taking. And generally whenever a demand of the goods is necessary to show the plaintiff's right of action, it must be alleged; and if not alleged, it cannot be proved on the trial. (1 Van Sant. Pl. 276.) Proof of demand and refusal was necessary before the code as it is since. (*Bates et al. v. Conkling*, 10 Wend. 389.) In *Bristol v. The Rensselaer & S. R. Co.*, 9 Barb. 158, Cady, J., in pronouncing the opinion

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of the Court, says: "By the code the plaintiff must in his complaint state facts constituting his cause of action. He is not at liberty to make out his cause of action by proving facts not alleged in his complaint."

Judge Clarke in *Fuller v. Lewis*, 3 Abbott's Pr. R. 383, avers the entire grounds on this point as follows: "According to the code every complaint must contain the facts constituting the cause of action, meaning of course all the issuable facts. Therefore if a demand and refusal are issuable facts material to the maintenance of the action, whatever might have been the former rule on the subject they must now be stated in the complaint. It appears to me beyond question not only to be a well established rule, but a wise and just one, that where personal property, the subject of the action, has come into possession of the defendant by *the delivery of the wrong doer*, it is necessary where the defendant merely detains them to prove that he has refused to deliver them up upon demand by the plaintiff. And it matters not what was the nature or character of the fraud by which the property was originally obtained from the plaintiff, or in what character or in what manner it was delivered to the defendant, if no fraud or complicity in the transaction can be imputed to him." And generally as to the facts required to be pleaded, see *Eno v. Woodworth*, 4 Coms. 249; *Garvey v. Fowler*, 4 Sand. 667; *Man v. Morewood*, 5 Sand. 558; *Smith v. Leland*, 2 Duer, 497; *Fairbanks v. Bloomfield*, Id. 349; *Lienan v. Lincoln*, Id. 670; *Lawrence v. Wright*, Id. 673; *Allen v. Patterson*, 3 Selden, 478; *Safford v. Drew*, 3 Duer, 632; *Tiffany & Smith's Practice*, 343-4; *Piercy v. Sabin*, 10 Cal. 28; *Jerome v. Stebbins*, 14 Id. 457; *Green v. Palmer*, 15 Id. 415; *Tissot v. Darling*, 9 Id. 285; *Levison v. Schwartz*, 22 Id. 229.

As a demand and refusal was necessary to be shown, both in the complaint and by the proofs, the defendant was not called on to set up in his answer the want of such demand. He was not required to answer what was not alleged, and if he answered a legal conclusion by a denial in similar terms, it certainly did not affect his defense either as against the complaint because of a want of the material averment, nor upon the trial for the lack of evidence on part of plaintiff. Nor can I see wherein the defendant was cut

State of Nevada ex rel. Nourse v. Clarke.

off from this defense by reason of claiming ownership of the property. "The defendant may set forth by answer as many defenses * * * as he may have." (Pr. Act, § 49.) Can it be said, that if demand and refusal had been stated in the complaint, the defendant would not have been permitted to deny these averments, and also plead property in himself? Undoubtedly this would have been his privilege. Wherefore, then, shall he be denied the same right, when the complaint does not state nor the proof show a demand?

The case of *Seaver v. Dingley*, before cited, is referred to by Justice Lewis on this point. The point decided there turned on a question of pleading, under the practice of that State, and cannot be considered as authority under our code, where the pleadings and practice are so dissimilar.

Wherefore I conclude, that upon the record the judgment should have been the other way.

STATE OF NEVADA EX. REL. GEORGE A. NOURSE, v.
ROBERT M. CLARKE.

A person holding the office of United States District Attorney, on the day of election, is incapable of being chosen to the office of Attorney General of the State.

- Section 9 of Article IV of the Constitution of Nevada, which declares "that no person holding any lucrative office under the Government of the United States, or any other power, shall be eligible to any civil office of profit under this State," is not confined to members of the Legislature, but is applicable to all officers of State.

A person holding a civil office under the United States, can resign such office without the consent of the appointing power, or the acceptance by it of such resignation. It is not in the power of the Executive to compel any civil officer to remain in office.

THIS is an original proceeding in the nature of a *quo warranto* in this Court.

George A. Nourse in pro per.

R. S. Mesick, for the Defendant.

State of Nevada ex rel. Nourse v. Clarke.

Opinion by BEATTY, C. J., BROSNAN, J., concurring.

Proceeding in the nature of a *quo warranto*.

The relator, George A. Nourse, was elected Attorney General of the State of Nevada, in 1864, and entered on the duties of that office the fifth of December the same year.

At the November election, 1866, the defendant received the largest number of votes for the same office; soon after received his certificate of election and commission, and on the seventh of January, 1867, (the day fixed by law for the commencement of a new term of that office) having previously qualified, he entered on the performance of the duties of the office, since which time he has continued in the office.

On the eighteenth day of January, A.D. 1867, the present relator filed his complaint or information, setting up substantially that defendant was not eligible to the office of Attorney General when he received the votes for that office; that by reason of such ineligibility on the part of defendant there was no person elected to that office, and that relator was entitled to hold over until the next general election. To sustain his case, he showed that Clarke, prior to the November election, 1866, had been United States District Attorney for the State of Nevada.

Defendant showed that on the twenty-fifth of October, 1866, he wrote a conditional resignation of his office of District Attorney. This resignation was to take effect on the first of January, 1867, or on the appointment of his successor. There is no positive proof that his resignation was ever forwarded to the President, but the circumstantial evidence tending to show that the President received it prior to the twenty-seventh day of November, 1866, is very strong. On the fifth day of November, 1866, one day prior to the election, the defendant wrote a peremptory resignation to take effect *immediately*. This was mailed the day it was written and sent by the next mail, which left this place the night of the fifth, or very early on the morning of the sixth.

In determining the rights of the parties under this proceeding, we are first called on to interpret and construe several clauses of the Constitution of Nevada. Section 9, Article IV, of the Constitution is in these words :

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“No person holding any lucrative office under the Government of the United States, or any other Power, shall be eligible to any civil office of profit under this State; provided, that postmasters, whose compensation does not exceed five hundred dollars per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office.”

The language of this section is certainly comprehensive enough to include within its scope the office of Attorney General; but the defendant contends that other sections, by their context, show that this provision is not applicable to that office. He contends that this section being contained in that article which relates to the legislative department, refers only to such offices as are in some way connected with the legislative branch of the government.

This view it is claimed is strengthened by the fact that the twelfth section of Article V provides that “no person shall, while holding an office under the United States Government, hold the office of Governor, except as herein expressly provided.” If the Section 9 in Article IV applies to all officers, why repeat this prohibition in Section 12 of Article V?

Again, Section 19 of Article V reads as follows: “A Secretary of State, a Treasurer, a Controller, a Surveyor General and an Attorney General shall be elected at the same time and places, and in the same manner as the Governor. The term of office of each shall be the same as is prescribed for the Governor. Any elector shall be eligible to either of said offices.” Here the qualifications necessary to make a party eligible to the office of Attorney General are stated, and it is contended that this section negatives the idea of there being any other qualification required.

The mere fact that Section 12 of Article V repeats a prohibition against the Governor of the State holding that office whilst he holds one under the General Government, we think is not entitled to much weight. The different articles of the Constitution are generally under the superintendence of distinct committees.

The attention of each committee is called particularly to the article immediately under its supervision.

The draft of the whole instrument from necessity is not in the hands of one person or of one committee. Hence, there is a lia-

bility to unnecessary repetitions. We think it clear that the ninth Section of Article IV was not intended to be confined in its effect to officers connected with the legislative department of the Government.

The last sentence in Section 19 of Article V, in speaking of certain officers, including the Attorney General, says: "Any elector shall be eligible to either of said offices." This sentence seems as plainly to dispense with any qualification for this office other than those pertaining to any elector, as Section 9 of Article IV imposes the disqualification arising from holding a Federal office. In language, there is a complete contradiction between the two sections. Usually, where there is one section in a statute or Constitution, general in its terms, and another section special and limited, but in direct conflict with the general provisions, the latter should be construed as an exception to the general law. And if we were to look only to Sections 9 of Article IV and 19 of Article V, we would be bound to come to the conclusion that the first mentioned section established a general rule applicable to all offices, and the latter an exception to that rule in favor of the five offices therein mentioned. But examining Section 19 in connection with other portions of Article V, we are led to the conclusion that this section was not intended to make an exception to the general rule laid down in Section 9 of the preceding article.

Section 3 of Article V provides that a party, to be eligible to the office of Governor, shall possess certain qualifications as to age and length of residence, beyond those required for a mere elector.

Section 17 of same article requires the same qualifications to make a party eligible to the office of Lieutenant Governor as are required for Governor. Section 19, in regard to Attorney General and other officers, concludes by declaring that "any elector shall be eligible to those offices." This taken in connection with the preceding sections, we think shows that the connection intended by the latter sentence to express the qualification as to age and residence which would be required in such officers, and not to exempt them from the operation of Section 9 of Article IV. Whilst we are satisfied that in coming to this conclusion we have arrived at the true intent of the Convention, we have doubted whether we

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have not violated some important rules of construction. Rules on this subject are necessarily conflicting. We can only endeavor, guided by the circumstances surrounding each case and those rules which have been established by the wisdom and experience of Judges for past ages, to arrive at the intention of the law-making power, when the language used can by any fair construction be made to express such intention.

Admitting, then, that Section 9 of Article IV applies to the office of Attorney General, we are next called on to interpret the word "eligible" as used in this section.

The relator contends that the plain and unmistakable meaning of the word is "capable of being elected or chosen."

The defendant on the other hand contends that, as used in this section, it means not "capable of being chosen," but "capable of holding." "If," says defendant, "this is a mere prohibition against being elected to a State office whilst holding a Federal office, then a party might be elected to a State office first, receive a Federal appointment to a lucrative office afterwards, and hold both offices at the same time." This would be in violation of the spirit of the instrument. We agree with the defendant that the framers of the Constitution intended to prohibit one who was holding a lucrative Federal office from holding a State office at the same time. But instead of restricting the meaning of the word "eligible," as defendant contends, we think, to carry out the intention of the Constitutional Convention, we ought rather to give it a more extended signification than is generally given, and hold that it means both "incapable of being legally chosen" and "incapable of legally holding."

The etymology of the word and the meaning generally given to it by the best English authors would hardly justify this interpretation. But the word, as used in various State Constitutions, seems to justify this broader and more comprehensive interpretation. In nearly if not quite all the State Constitutions, the principle seems to have been adopted of prohibiting those who were holding lucrative Federal offices from holding at the same time the more important State offices.

Sometimes the most appropriate language has not been used to

express this prohibition. The word "eligible" in many of the Constitutions as in ours, seems to have been used in a very comprehensive sense. If then, as we have concluded, one holding the office of United States District Attorney on the day of election is incapable of being lawfully chosen to the office of Attorney General of the State of Nevada, the next point of inquiry is: Was the defendant United States District Attorney on the sixth day of November, 1866?

This we think depends on this question: Can a person holding a civil office under the United States Government resign the same at will without any regard to the will or convenience of the appointing power? Upon this subject there appears to be no statutory or written law. We find no English authorities, and but few decisions in the United States.

We have one citation (from 4 Dev. Reports) to the effect that, as offices are held at the will of both parties, an officer must retain his position until his resignation is accepted. As we have not the report itself, but a mere citation in Bouvier's Law Dictionary, we are not able to determine what weight should be given to the decision. It may be founded upon some State law, which would render it inapplicable in this case.

In the case of the *United States v. John C. Wright*, upon a bond given as surety for the faithful performance of duty by one Fogg, a revenue officer, one of the defenses interposed by Wright was substantially to the effect that Fogg, for whom he was surety, resigned his office on the second of August, 1817, and that he had committed no default prior to that time. In the United States District Court, where the case was first tried, it was found that Fogg, on the twenty-fifth of July, 1817, had written a letter of resignation. The resignation, however, was by the terms of the letter to take effect when a successor should be appointed. That letter was received on the second of August by the Commissioner of Revenue. The Commissioner requested Fogg to hold on for a time, and he continued to exercise his office for several months thereafter.

The District Judge before whom the case was tried instructed the jury that Fogg had resigned his office on the second of August, and his sureties were not bound for his acts after that time. The

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United States took the case by writ of error before the Circuit Court, and the only point discussed seems to have been whether the charge of the District Judge was erroneous ; the defendant contending : First, that the charge was correct ; second, that if not technically correct, it did the plaintiff no harm. The first point, then, for the Court to determine was, whether the charge was correct. This necessarily involved the question, when did the resignation of Fogg take place ; or rather the question, did that resignation take place on or before the second of August ? If so, the plaintiff had no cause of complaint.

The Court, in considering this question, came to the conclusion that the resignation did not take effect on the second of August, for the reason that it was not a peremptory resignation, but a conditional one in its terms. But whilst they arrived at this conclusion, they took occasion to express themselves in regard to the right of resignation, in the following terms : " There can be no doubt that a civil officer has the right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office. It is only necessary that the resignation should be received to take effect ; and this does not depend upon the acceptance or rejection of the resignation by the President. And if Fogg had resigned absolutely and unconditionally, I should have no doubt that the defendant could not be held bound subsequently as his surety."

But relator contends this is a mere dictum, and therefore entitled to but little weight. *Dictum* is defined to be an opinion expressed by a Judge on a point not *necessarily* arising in a case. Perhaps this may be called a mere *dictum* ; for after determining that the resignation was not absolute, and for that reason did not take effect on the second of August, it was not essential to say that it would have taken effect on that day if it had been absolute. But whilst we may say that this was technically a mere *dictum*, it certainly is not liable on the main point (to wit, the absolute right of resignation) to the objections usually urged against the binding force of *dicta*.

The reason assigned for their not being entitled to weight is that usually they are upon some point not discussed at bar—something to which the attention of the Court has not been particularly called

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—and something on which the Judge uttering them may not have reflected a moment before expressing his opinion.

Here one of the principal points of discussion must have been : Has a civil officer the absolute right of resignation, without regard to the acceptance or nonacceptance thereof? The Court, after listening to that discussion, says in effect: " We have no doubt at all that he has such right, but we think this officer did not exercise that right; his resignation was not absolute but conditional." A decision given under these circumstances, after full discussion, we think entitled to far more weight than an ordinary *dictum* upon a point not discussed, and not connected—except in some remote and incidental manner—with the case decided.

The Supreme Court of California, in the case of *People v. Porter*, 6 Cal. 28, adopt that part of the decision in 1st McLean's Reports, which holds " that there can be no doubt that a civil officer has the right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office."

The relator objects to this authority on the ground that resignations of County Judges in California were at that time regulated by statute. That whilst there is no doubt of the correctness of the rule adopted in Porter's case on the subject of resignations, yet the reason of that ruling is to be found in the statute, and not in common law principles. There is certainly some force in the argument of relator that the California statute affords strong ground for such a rule, independent of common law principles. But the report of the case of the *People v. Porter* does not show that the counsel for plaintiff took any such grounds; they seemed to rely on common law principles alone to maintain this point. The Court sustained them without any reference to the statute whatsoever. So far as the authority is concerned, the weight thereof seems to be in favor of the proposition that a civil officer has the absolute right of resignation at pleasure. As a matter of reason and policy we think that the better rule. Where there is no law compelling the acceptance of office, we see no reason for compelling the retention thereof after acceptance.

Whilst there are generally many applicants for all offices that are lucrative, there are other offices to which are attached neither salary

nor perquisites, or if any, so small an amount as not to be sought after by any person. If a party accepting such office did not have the unconditional privilege of resigning at will, the best citizens would be deterred from accepting.

Guided then by the best lights before us, we must conclude that a civil officer has the absolute right of resignation at will. If this be the case, when did the defendant resign? Not on the twenty-fifth of October, because that was a conditional resignation. But he did resign on the fifth of November. That day he placed his resignation in the post office; by the following morning it was mailed and beyond his reach. At the same time he gave notice to the District Judge of his resignation, and his intention no longer to exercise the functions of the office, and from that day ceased to act as such.

Now, if defendant had an absolute right to resign at any time, it seems to us he exercised that right on the fifth of November. He wrote his resignation to take effect *immediately*, and he did an act which we consider equivalent to a delivery of that resignation to the proper officer. He mailed it and placed it beyond his power to recall. From the time the letter started in the mail the writer had no control over it. When it arrived at Washington, it belonged to the President and not to the writer. He could not reclaim the letter. He might, it is true, have telegraphed his withdrawal of the resignation. But this, in our opinion, would have effected nothing. According to our view, the moment the letter went beyond his reach a vacancy occurred in the office, and no telegram he could send would fill that vacancy. That could only be done by a new appointment. When a resignation is sent to take effect at a certain day the case is different. Then there is no vacancy in the office until that day arrives, and if in the meantime the resignation is withdrawn, the party stands as if he had never written or sent his resignation.

In arriving at the conclusion that defendant's resignation took effect on the fifth of November, we have not overlooked the fact that we run counter to a part of the opinion in the case reported in 1 McLean.

But that portion of the opinion is a pure *dictum* upon a point

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which could not well have been the subject of discussion or mature consideration. The defendant set up the defense that Fogg had resigned on the second of August, and defendant was not thereafter bound. This defense was equally available if the resignation took effect on the twenty-fifth of July. For if Fogg was not an officer after the twenty-fifth of July, he certainly was not after August 2d. The defendant then took the strongest position for him, that the sending and receipt at the proper office of the resignation made a vacancy in the office.

The Court holding under these circumstances that the sending and receipt of the resignation did effect a vacancy in the office, scarcely amounts to a *dictum* to the effect that the sending of it alone would not have produced the same result.

We do not know in this case (perhaps the Circuit Court did not know) how the resignation was sent. If sent by the private agent of the officer resigning, undoubtedly it should not have been treated as delivered by the officer until it reached its destination. In contemplation of law in such case, the resignation was in his own hands and under his own control. Not so where it is placed in the public mails. So too where there is a resignation in the ordinary form, not designating when it is to take effect, it might well be held that such resignations are not intended to take effect until received by the appointing power. But where there is no ambiguity, but an absolute resignation to take effect *immediately*, to hold that the officer remains in office after placing such a paper in the post office is simply to hold that he has not an unqualified power of resignation. If he must remain in office until his resignation is received, the officer to receive it might in many ways retard or prevent the reception of the resignation, and thus compel a party to remain in office against his will.

Having disposed of the case on this point, we do not think it necessary to determine what the relator's rights would have been in case we had determined the defendant was not eligible. The proceeding is dismissed at the cost of the relator, and the clerk will so enter the judgment.



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ABATEMENT.

1. When a second action for damages is brought, including the damages in a former action, and also damages accrued after the bringing of the former action, the first suit cannot be pleaded in abatement of the last. A plea of abatement must go to the entire cause of action. *Whilman Co. v. Baker et al.*, 387.

ACCOUNTING.

1. When county warrants are pledged to a merchant as security for a running account, and there is an agreement that the merchant may at any time sell the warrants at fifty cents on the dollar or take them himself at that price, he will not be allowed to hold them at that price unless he shows clearly, either that he notified the pawner of his intention to take them at the rate of fifty cents, or actually gave him credit at that price on his books. *Beatty v. Sylvester*, 228.
2. If there was any fraudulent or unfair conduct on the part of the pawnee, he will not be allowed to hold the warrants at fifty cents on the dollar. *Id.*

See BILL FOR REDEMPTION.

PARTITION.

ACQUITTAL.

1. A verdict of acquittal on a good indictment puts an end to all further prosecution for the offense charged in that indictment, notwithstanding any errors that may have been committed during the progress of the trial. *State v. Hall*, 172.
2. A defendant tried on a criminal charge and found not guilty by a jury cannot again be put on trial for the same offense. *State v. Herrick*, 259.

AFFIDAVIT.

See PARTITION.

ALIMONY.

1. When an allowance is made to a wife for expenses of procuring attendance of witnesses in one district, and the case is afterwards removed to another district where all the witnesses reside, it would be proper for the Judge of the latter district to review the allowance made, and modify it according to his views of the necessary costs in his district. *Sheekles v. Sheekles*, 404.

AMENDMENTS OF RECORDS.

1. In the matter of amendment of Court records, the question should be treated as one of legal discretion, rather than of jurisdiction solely, that whilst the power is not unlimited, neither is it absolutely restricted to the particular term, but may be exercised within the bounds of a legal discretion, whereof the subject matter of the amendment and the circumstances under which it is allowed constitute the only test.—Per JOHNSON, J. *Lobdell v. Hall et al.*, 508.

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APPEARANCE.

1. The statute, having prescribed what shall be an appearance for certain purposes, does not preclude an appearance in a different manner for other purposes. *State ex rel. v. McCullough*, 202.
2. Although an alternative writ of mandamus may not properly be returnable in less than ten days after its issuance, yet if the respondent appears upon such writ and asks for time to make his answer, and that time is granted, he cannot afterwards be heard to complain that the writ was irregular as to the time when a return was required. *Id.*
3. A general appearance not only waives defect in a writ, or summons, but gives jurisdiction over the person in cases where the writ was void. *Id.*

APPROPRIATION.

1. The first appropriator of public land has always been held in the Courts of this State as the owner of the same. The party who appropriates public land for a road is just as much entitled to it as one who appropriates a piece of land for a mill-site or cornfield. *Chollar Co. v. Kennedy et al.*, 361.

ASSESSMENT.

1. Where an assessment is made of the value of a town lot, it implies the total value, and not the mere value of a possessory claim. *Wright v. Cradlebaugh*, 841.
2. Where other language is used in the tabular forms furnished to the assessors, indicating that only the possessory right is valued, the language first used may be qualified by this latter phrase; but in the absence of qualifying language, the value with a fee simple title will be understood. *Id.*
3. Where the fee in United States land is assessed for taxes, the assessment is utterly void. *Id.*

4. Two contiguous lots owned by the same individual may be jointly assessed, and only one valuation fixed for the two lots. *Id.*
5. There was no necessity for describing these lots by metes and bounds, nor of giving the number of acres, for several reasons. First: Carson is called a city, in the Constitution, the statute laws of the State and by common consent. It may therefore be held a city under the provisions of the revenue in regard to city lots. Second: to describe a lot by its number of lot and block in a regularly laid out town, (whether a city or not) is describing it by its common designation or name. *Id.* 342.
6. Per JOHNSON, J.—The Assessor used apt and appropriate language to describe the property assessed. The description does not necessarily imply that the fee simple title was assessed. The Assessor is not bound to ascertain the title by which a party holds lands. There was no defect in the assessment so far as the title to the land is concerned. *Id.*
7. The law requires each city lot to be assessed separately, and a joint assessment of one lot and a fraction is void. This interpretation of the law is strengthened by the fact that it was so interpreted by the highest Court of California before we copied it from their statutes into our laws. A tax sale in pursuance of such assessment is void. *Id.*
8. UPON REHEARING.—Taxing or assessing a piece of property in general terms is taxing or assessing its whole value, and not the value of a particular interest or estate carved out of the whole. *Id.*
9. When the title of real estate has passed from the Government, the Assessor only has to ascertain the total value, and the whole land is bound for the tax. If the estate is divided among several, the interest of each may be assessed separately, or the entire interest may be assessed in gross. But if the title is in the Government, the only thing liable to assessment is the possessory right—in other words, the value of the land less the price to be paid the Government. *Id.*
10. An assessment of the gross value of Government land makes it absolutely void. The second column in the Assessor's table should distinctly state when only the possessory claim is assessed. But where that fails to make the proper statement, possibly the proper entry in the seventh column might correct the omission in the second. *Id.*

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ASSIGNMENT OF ERRORS.

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ATTACHMENT.

1. Where an affidavit was made on the fifth of October, stating the necessary facts to justify the issuance of an attachment, but was not filed until the sixteenth, on which day the attachment was issued: *held*, this was sufficient to justify the issuance of the writ. It having been shown that the debt was past due and unpaid on the fifth, the presumption of law is, it still remained so on the sixteenth, there being no showing to the contrary. *O'Neil v. New York and Silver Peak Mining Co.*, 141.

2. In cases of doubtful construction of statutes, the Courts will look to the effect to be produced by one or the other construction, and give a statute such effect as will be most beneficial. *Id.*
3. Per LEWIS, J., *dissenting*.—The provisional remedies under our code are in derogation of the common law, and the statute must be strictly followed. An affidavit that a debt is due eleven days before suit brought, is not conclusive that it is unpaid at the date of bringing the suit, and no presumption of law can be taken in lieu of the positive proof required to be offered by plaintiff's affidavit. *Id.*

ATTORNEY.

1. An attorney who is authorized by a city council to bring a suit for the benefit of the city, has authority to direct a Sheriff to serve the summons in such case, and may bind the city to pay for such service. *Feusier v. Mayor et al.*, 58.

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AUTHENTICATION.

See DEPOSITION, 1, 2, 3, 4.

BILL FOR REDEMPTION.

1. Where goods are pawned as security for a running account, it is not essential that the pawner should tender the amount of account before filing a bill to redeem. *Beatty v. Sylvester*, 228.
2. If he proffers to account with the pawnee, and pay whatever is found due on such accounting, and that proffer is refused, he may bring his complaint for accounting and redemption at the same time; and if the pawnee has sold the goods, he may have a decree for the balance due him from the proceeds of sale. *Id.*

BOND.

1. Where a bond is drawn up in California, and there signed and sealed by one obligor, and then sent to this State to be signed and sealed by the remaining obligor, the finishing act in the execution of the bond having been done in this State, it must be held in regard to the Statute of Limitations as a bond executed in this State, and not in another State. *Alcalda v. Morales*, 132.
2. The terms and form of a bond having been previously assented to, and the consideration paid by the obligee, it must be considered as having been delivered as soon as placed in any public conveyance, or in the hands of any person to be delivered to the obligee. *Id.*

See CONSTABLE'S BOND, 1.

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See JURORS.

CHANCERY PRACTICE.

1. In an equity case, this Court may order the proper decree to be entered in the Court below without the formality of a new trial. *Feusier v. Sneath*, 120.

2. UPON REHEARING.—The unsupported testimony of one of the contracting parties to a sealed instrument can in no case be sufficient to establish fraud in proving the execution of the instrument. *Id.*
3. The rule that an Appellate Court will not disturb the judgment of a *nisi prius* Court founded on the verdict of a jury where there is conflicting testimony, has no application to Chancery cases tried without a jury. More especially is this the case when all the important testimony is contained in depositions. This Court is as competent to determine the weight and effect to be given to written testimony as the Court below. *Id.*
4. When A engages B to furnish money and buy up a mortgage against A, with an agreement that A will execute a new mortgage to secure the money advanced, and after the purchase of the old mortgage by B, A refuses to execute a new one to secure the money advanced, B may foreclose and enforce the old mortgage. *Lockwood v. Marsh*, 138.
5. A bill to quiet title will not be sustained in favor of a party not in possession. So too a complaint for the recovery of possession of property will not be sustained where it shows on its face the pendency of another proceeding for the same purpose. *Lake Bigler Road Co. v. Bedford*, 399.

See INJUNCTION, 1.

COMPENSATION.

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1. If the compromise had been fraudulently entered into by both parties, with a view of cheating the covenantee, then a Court of Equity might have given relief. *Stonecifer v. Yellow Jacket Co.*, 38.
2. A party in possession always has a right to buy his peace from one asserting an adverse claim, and such compromises will always be upheld where there is no fraud committed. *Id.* 39.

See COVENANT FOR TITLE, 2, 3, 4.

CONSTABLE'S BOND.

1. Are the sureties on a Constable's bond liable for a trespass committed by him under color of process? And if so, is the liability primary, or are they only answerable after the liability of the Constable has been fixed by judgment? *Reed v. Ash*, 116.

CONSTITUTIONAL LAW.

1. Without the express approval of the Governor, an Act of the Legislature can only become a law in two cases. First: when it is passed over his objections by a two-thirds vote of each House. Second: when he fails to return a bill with his objections within the time prescribed by the Constitution. *Birdsall v. Carrick*, 154.

2. When the Governor in due time sends back a bill which has been submitted to him, stating that he cannot act on it because of some supposed informality in its passage, this is in effect an objection to the bill, and it can only become a law by further action of the Legislative branch, although the Governor may have been mistaken as to the supposed defect in the bill. *Id.*
3. If a law be passed by the Legislature, constitutional in part but unconstitutional as to some of its provisions, that which is constitutional will be sustained, unless the whole scope and object of the law is defeated by rejecting the objectionable features. *State v. Easterbrook*, 173.
4. In this case, rejecting that part of the Act which is unconstitutional, there still remains a complete Revenue Law. *Id.*
5. The Legislature of this State, when convened in special session, can only legislate on those subjects for which they were specially convened, and such others as may be called to their attention during the session, by the Governor. *Jones v. Theall*, 283.
6. The Secretary of State may transmit to the Legislature in extra session the bills vetoed by the Governor, after the expiration of the regular session, but unless the Governor call attention to these vetoed bills and require action thereon, the Legislature is powerless to act until the next regular session. *Id.*
7. This constitutional provision only prohibits the Legislature from increasing or decreasing the number of dollars in lawful money at which the salary of an officer is fixed, at the time of his election. *Beatty v. Rhodes*, 240.

See OFFICE, 1; OFFICER, 1, 2, 3.

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LEGAL TENDER NOTES.

CONTINUANCE.

See PRACTICE, 10, 15, 16.

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See PLEADING, 1, 2, 3.

CONVEYANCE.

1. A legal interest in land can only be conveyed in this State by means of a deed of conveyance in writing. The right to the enjoyment and repair of a dam, and to have the water so diverted flow through certain land, is such an interest in land as can only be conveyed by deed in writing. *Lobbell v. Hall et al.*, 507.

COPARTNERSHIP PROPERTY.

See JOINT PROPERTY.

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CORPORATE POWERS.

1. There was no law authorizing the city to bid in the lots offered for sale under this judgment; she derived no advantage from such pretended purchase, and

the Sheriff acquired no new rights thereby. Had the lots been actually sold, and the illegal fees charged by the Sheriff actually come into the city treasury, the city might have been estopped to deny the Sheriff's rights. *Feusier v. Mayor et al.*, 59.

2. Per BROSNAN.—The property against which proceedings in this case were instituted, was purchased in, by, and for the city. The city afterwards resold, at least a part of this property. Certainly, as far as it received a benefit from the services of the Sheriff, it must pay for the same. *Id.*

CORPORATIONS.

1. The existence of corporations created in other States will be recognized by the Courts of this State. The power of the corporation, or of its officers under the laws of the State when created, will be inquired into in the Courts of this State when necessary to determine controversies arising here. *State ex rel. Curtis v. McCullough*, 202.
2. Officers of a corporation are not recognized as such in a State in which the corporation does not exist. But a foreign corporation may have agents in any State. *Id.*
3. There may be no *office*, technically speaking, to which relator may lay claim, yet he may have a *right* to represent the corporation as its agent; and the writ of mandamus, under our statute, is the proper mode for restoration to such right. The remedy afforded by this writ, under our statute, is broader than at common law. *Id.*
4. The Court has jurisdiction to determine the rights of the individuals within its jurisdiction, each claiming under a foreign corporation, although it may have no jurisdiction over the corporation itself. *Id.*
5. Where the law creating a corporation requires that the stockholders shall elect trustees annually, at such time, place, and manner as may be determined by the by-laws, the election must take place substantially every twelve calendar months. A set of trustees, holding office, cannot by a by-law extend their own term for three months beyond the period for which they were originally elected. *Id.* 203.
6. Trustees of a corporation can lawfully do nothing against the interest of the corporators, or to deprive them of their reserved rights. *Id.*
7. No elective officer has a right to do any act which would prevent the election of his successor at the time fixed by law for such election. *Id.*
8. A corporation formed in California may hold land in this State. *Whitman Co. v. Baker et al.*, 386.
9. Our Courts would, in a proper case, probably hold that a corporation formed in another State could hold no more land in this State than is allowed to be held by corporations under our own law, to wit: what was necessary to conduct the business for which it was incorporated, and no more. *Id.*
10. When a corporation formed in another State is limited by its charter as to the number of acres of land it may purchase for the purpose of conducting its business, will our Courts hold that such corporation is incapable of holding a greater number of acres in this State—*Quere?* *Id.*

11. It would seem the Legislature might grant to foreign corporations the right to acquire in this State any quantity of land, although limited by its charter to the purchase of a smaller quantity. *Id.*
12. Corporations created by Legislative enactment have only such powers as are specifically granted, or are necessarily incident to those granted. *Id.*
13. There is a difference between exercising powers entirely foreign to the nature of a corporation, and exercising legitimate powers to an improper extent. In the former case the acts done might be absolutely void; in the latter they would only be voidable by a proper proceeding on the part of the State. *Id.*
14. If a corporation holds more land than it is legitimately entitled to hold, still individuals will not be protected in trespassing on any portion of such land. *Id.*

See ATTORNEY, 1.

CRIMINAL PRACTICE.

See INSTRUCTIONS, 1, 2, 3.

COSTS.

See PRACTICE, 3, 4, 5, 6, 7, 8.

MANDAMUS, 6.

COURT.

See INTERPRETATION, 1.

COVENANT FOR TITLE.

1. The doctrine that he who buys land with a full knowledge that there is a pre-existing contract in regard to the sale of the same will be held in equity to carry out that contract, has no application to a case where the party seeking the equitable relief never was entitled to a conveyance from the party with whom he contracted, and when that party never in fact had any title to convey. *Stonecifer v. Yellow Jacket Co.*, 38.
2. Where A claims an interest in a piece of real estate, and being out of possession conveys his alleged interest to B, for the purpose of enabling him to prosecute a suit for the same, with an agreement on the part of B to reconvey a portion of the property, if recovered, B has full power to compromise the suit, even without the consent of A, and the title would be established by a judgment and deed, in pursuance of such compromise. A might be entitled to an action against B for damages, but would have no claim on the land. If A consented to the compromise made by B, certainly a third party having a contract with A for the conveyance of a portion of his contingent interest, would not be allowed to question the title of the parties in possession who compromised with A and B, and obtained a deed for whatever title B had. *Id.*
3. Where a party who is prosecuting a suit for the recovery of land covenants, in case of recovery, to convey a part of the land recovered to another, and afterwards compromises the suit so as to prevent the possibility of recovery, he may be liable to his covenantee in damages, but the party in possession, who compromises the suit, is not affected by the previous existence of this covenant. *Id.*

4. A party who has covenanted to convey, in the event of recovery, may be under obligation not to compromise the case so as to prevent the possibility of recovery. But no such obligation rests on defendant: he has a perfect right to buy his peace, regardless of all contracts between his opponent and others. *Id.* 39.

DAMAGES.

1. The plaintiffs should have been allowed to prove the value of the fixtures they wanted to remove, by way of furnishing the jury with one material fact from which they might estimate the damage which resulted from the refusal to permit the removal. *Prescott et al. v. Wells, Fargo & Co.*, 82.

See COVENANT FOR TITLE, 2.

PLEADING, 3.

VERDICT, 1.

DEBT OR DEFAULT.

See STATUTE OF FRAUDS, 2.

DEED.

1. Usually, a deed passes only what is described in the granting clause; but under modern and liberal rules of interpretation, an explanatory clause or *habendum* of a deed may cause that to pass which could by no possible interpretation be held to have been described in the granting clause of the deed. *McCurdy v. Alpha Co.*, 27.
2. Parties usually describe what is intended to be granted in the granting clause of the deed. And Courts should not interpret deeds so as to carry more than is mentioned in that clause, unless the intent to carry more is clearly shown in other portions of the deed. *Id.*
3. An explanatory clause in a deed should not be so interpreted as to be repugnant to the granting clause, especially when there is not necessarily any such conflict. *Id.*
4. A deed may be interpreted by the aid of surrounding circumstances, which are known to, and understood by, the contracting parties. A full knowledge of surrounding circumstances may make that intelligible which would otherwise be unintelligible. *Id.* 28.

See CONVEYANCE.

DEFAULT.

1. When a plaintiff might proceed under either one of two laws prescribing the method of serving summons, one of which laws would require the defendant to answer within twenty days, and the other forty, and the summons was so contradictory and indefinite as not to show under which law the plaintiff was proceeding, the defendant would not be bound to answer within twenty days, and no default could legally be taken until after the expiration of forty days. *Kidd v. Four-Twenty*, 881.
2. Where the first clause of a summons requires the defendant to appear and answer within forty days, and concluding clause notifies him that if he does not

answer in *twenty* days a default will be taken, this is too contradictory and uncertain to require an answer within the shorter period. *Id.*

3. When a default is improperly taken the defendant ought, if an opportunity is presented during the term at which it was taken, to apply to the Court below for relief. *Id.*
4. Could the lower Court set aside a default and judgment after the term had expired within which the judgment was rendered—*Quere?* *Id.*
5. Appeal is a proper remedy to set aside a judgment by default irregularly and erroneously entered. *Id.*

DEFENSE.

See INDICTMENT, 5.

DEMAND.

See REPLEVIN.

DELIBERATION, TIME FOR.

See MURDER, 1.

DEPOSITION.

1. Where the parties to a suit agree that a deposition may be taken at a certain place, during a certain month, before T., a notary public in another State, the deposition certified by T., made under his official seal as a notary, may be read by either party without other proof that T. was a notary when the deposition was taken. The seal is *prima facie* evidence of his official character. *Sargent v. Collins et al.*, 260.
2. Per JOHNSON, J., *dissenting*.—When parties to a suit agree that the deposition of a witness may be taken at a certain place (out of the State) on the — day of a certain month, before F. J. T., a notary public, the deposition cannot be read without proof, (beyond his own certificate) that F. J. T. was a notary when the deposition was taken. His seal in such case is not evidence of his official character. *Id.*
3. If the agreement admits T. was a notary when entered into, it does not admit that he would continue to be a notary until the taking of the deposition. *Id.*
4. Although parties may agree that a private individual may take depositions, still, if they consent that a certain person holding office may as such officer take a deposition, it cannot be held that they consented he might take it as a private individual. *Id.*

DUE PROCESS OF LAW.

1. "Due process of law" requires that a party shall be properly brought into Court, and when there, shall have a right to set up any lawful defense to any proceeding against him. The Legislature, under pretense of regulating pleading cannot deprive a party of substantial rights. *Wright v. Cradlebaugh*, 242.

EJECTMENT.

See JUDGMENT, 4, 5.

ELECTION.

See CORPORATION, 5, 6, 7.

ESTATE OF DECEASED PERSONS.

See EXECUTORS, 4, 5, 6, 7, 8, 9, 10, 11.

ERROR IN CALCULATION.

See PRACTICE, 1.

ESTOPPEL

See JUDGMENT, 1.

EVIDENCE.

See JOINT INDICTMENT, 1.

EVIDENCE—ORDER OF INTRODUCTION, OF.

See PRACTICE, 20.

TAX DEED, 3.

EXCEPTIONS.

1. ON PETITION OR REHEARING.—If there is an entire failure to make any note of an exception, taken either by the Judge or his Clerk, and the term of Court expires at which the case was tried and judgment rendered, the Judge would afterwards have no authority to settle, or make a bill of exceptions showing the fact. He might settle the statement even after the term, if made within the time prescribed by law. The general rule is, that after judgment and the adjournment of the term, the Court loses jurisdiction of the case for most purposes.—Per BEATTY, C. J. *Lobdell v. Hall et al.*, 507.
2. Under our practice, if an exception is actually taken at the trial, but not drawn up in form for the Judge's signature, and no note of it is made, either by the Judge or the Clerk, still the party dissatisfied with the judgment has a right to make his statement on motion for new trial, or on appeal, and in either of such statements he may show any exception that he really took during the trial, although there be no note of the same. For the purpose of settling such statements, the Court still retains jurisdiction of the case until the time prescribed by law has expired. After the statement is once made and settled, the Court below loses jurisdiction of the case, and no addition can be made to such statement.—Per BEATTY, C. J. *Id.*

See INSTRUCTIONS, 3, 14, 15.

EXECUTORS.

1. Waste, negligence and mismanagement afford as good grounds for the removal of an executor, as actual fraud. *Lucich v. Medin*, 98.
2. If an executor qualify as such, and totally neglect his duties, he should be removed, although he has committed no positive act of wrong. *Id.*

3. An executor who takes charge of an estate which is not in debt a dollar, except for the last sickness of the testator—which only lasted fifteen days—with cash assets on hand to the amount of \$4,300, and a monthly rental of \$500, and runs that estate behind to the extent of \$1,800, in nineteen months, is *prima facie* unfit for the trust he is exercising. *Id.*
4. An executor may employ counsel to attend to the litigation concerning the estate. But he has no right to employ counsel at the expense of the estate to keep the accounts and do that business for which he is compensated by his fees. If he is too ignorant to keep his own accounts, he must employ some one else to do it for him, and pay for the same out of his own per centage, which he is allowed for settling the estate. *Id.*
5. Where an executor files an account showing a certain balance for or against an estate, but never settles the same; then files a second account, beginning with the balance drawn from the first, and there is a regular hearing and settlement of this second account; this can be held *res adjudicata* only as to the items of the second account, (other than the balance with which it commences) and all the items of the first account are open to investigation. *Id.*
6. Under Section 203 of the Probate Act, an executor may pay money to compromise a suit pending against an estate. But he cannot lawfully make such payment without the previous consent of the Probate Court. *Id.* 94.
7. When a party who is executor of the estate of a deceased cotenant in common, pays money to compromise a suit about the common property without consulting the Probate Court, he will be held to have paid as a cotenant, and not as executor. *Id.*
8. In such case, the heirs of the deceased cotenant will be allowed the option to approve the compromise and contribute their share of the money paid on the compromise, or reject the same and depend on the testator's former title. *Id.*
9. An executor cannot borrow money to speculate for an estate, unless specially authorized by the will to do so. *Id.*
10. An executor having stock on hand liable to assessment, should either get an order of the Probate Court to sell it, or else, if the estate is surely solvent without the stock, turn it over to the legatees. He should not borrow money to pay the assessments. *Id.*
11. An executor who came into possession of an estate in his fiduciary capacity, cannot buy up an adverse title to the estate, and withhold the rents on his mere *ipse dixit* that the title he has bought up is superior to that of his testator. *Id.*

FIXTURE.

1. Fixture has several distinct meanings. Sometimes it means anything which is by artificial means affixed permanently to the soil. Sometimes it is used to designate something which is substantially affixed to the soil, but which may nevertheless be lawfully detached therefrom by one who has so affixed it without the consent of the owner of the soil. In this opinion the word will be used in the latter and more restricted sense. *Prescott & Booth v. Wells, Fargo & Co.*, 82.
2. It has often been held that fixtures were personal property, and might be recovered in trover. *Id.*

3. Pans furnished to a mill owner upon his agreement to pay rent therefor, and by him and the manufacturer attached to the mill and machinery of the same, are fixtures. *Id.*
4. If the owner of the mill should sell the mill with the fixtures, this would (under the authorities holding such fixtures to be personal property) amount to a conversion, and he might immediately be sued for such conversion; so the purchaser after demand made of him, and refusal to surrender the fixtures, might likewise be sued in trover and recovery had. *Id.*
5. Fixtures, although capable of being lawfully converted into personal property without the consent of the owner of the soil, are in their nature a part of the realty, and should be held and treated as such until actually severed from the freehold.—Per BEATTY, C. J. *Id.*
6. Trover will not lie for a fixture.—Per BEATTY, C. J. *Id.*

FORMER JUDGMENT.

See JUDGMENT, 1.

FRAUD.

See COMPROMISE, 1, 2.

PAROL TESTIMONY, 1, 2, 3, 4, 5.

RULE OF COURT, 1, 2, 4.

FRAUDULENT SALES.

See PROCESS, 1, 2.

GOVERNMENT LANDS, TAXATION OF.

See ASSESSMENT, 3.

TAX DEED, 1, 2.

APPROPRIATION, 1.

GRAND JURY, GRAND JURORS.

1. The eighth section of "An Act concerning Juries," approved March 3d, 1866, provides that when, during the term of a Court, the services of a grand jury are required, and there is no existing grand jury or there is a lack of sufficient numbers to form such a body, other grand jurors may be selected *in the same manner* as is provided for the selection of petit jurors in section six of the same Act. Section six provides for the selection of jurors by the *Judge* and the *County Assessor or Clerk*. The selection of grand jurors during a term of the Court must be by the same officers, or it will not be a legal grand jury. *State v. McNamara*, 70.
2. At common law a Grand Juror was not precluded from finding an indictment because he was either a witness or prosecutor. *State v. Millain*, 409.
3. Our statute fixes distinctly what shall be the disqualifications of a Grand Juror, and nothing else than what the statute prescribes can disqualify one from acting as such. *Id.*
4. Per JOHNSON, J.—As the law formerly stood, six grounds of challenge were

allowed to Grand Jurors. The three last were as follows: "Fourth, that he is a prosecutor upon a charge or charges against defendant; fifth, that he is a witness on the part of the prosecution and has been served with process, or bound by an undertaking as such; sixth, that he has expressed a decided opinion that the defendant is guilty of the offense for which he is held to answer." The insertion of the fourth and fifth clauses shows a distinction was taken between witness and prosecutor. The amendment of the law by striking out fifth and sixth clause, cannot be held to have added anything to the scope and effect of the fourth clause. *Id.* 411.

5. Even under the former law the objection would have been insufficient. The witness did not show that he had formed a *decided* opinion of prisoner's guilt. Neither is it shown that he was subpoenaed or otherwise bound to appear as a witness for the prosecution, nor in fact does it appear he was sworn as a witness for prosecution. *Id.*

See INDICTMENT, 1.

GUARANTOR.

See PLEADING, 8.

HABENDUM.

See DEED, 1, 2.

HOMICIDE.

See INDICTMENT, 11.

HOMESTEAD.

1. Does the Constitutional provision for protecting "a homestead as provided by law," absolutely protect a homestead of such dimensions and value as the law then in existence or thereafter to be made, might prescribe, or does it only require the Legislature to pass a law protecting a homestead upon such terms and conditions as the law may impose—*Quere?* *Hawthorne v. Smith*, 182.
2. It is clearly the intention of the Constitution to protect a debtor's homestead from forced sale. It is equally clear the Legislature intended to effectuate that intention. This being the policy of the law, creditors will not be allowed to defeat its object unless the statute clearly gives that right, or clearly points out the contingency upon the transpiring of which the debtor will lose his exemption. *Id.*
3. Property which possesses the characteristics of a homestead may be selected and recorded as such at any time before actual sale under execution. The levy of an attachment will not prevent such selection. *Id.*

HUSBAND.

See PARTIES TO BILL IN EQUITY.

IMPLIED WARRANTY.

1. Usually there is an implied warranty that an article manufactured for a certain purpose is fit for the use intended. But if the manufacturer is controlled as

to the manner of construction and the material used by the person ordering the article, he is only bound for skill and diligence—he is not responsible for the result. *O'Neil v. New York and Silver Peak Mining Co.*, 141.

IMPLIED PROMISE.

See INTERPRETATION, 3.

INDIANS.

1. An Indian who has appropriated water on the Public Lands of the United States may maintain an action for the diversion of that water, as well as any other person.—Per BEATTY, C. J. *Lobdell v. Hall et al.*, 507.
2. Any person getting possession of any dam or ditch for the diversion of water from an Indian, although there be no deed of conveyance, has the same right to maintain and enjoy such dam and ditch as the Indian had.—Per BEATTY, C. J. *Id.*
3. LEWIS, J., dissenting.—No person in this State can acquire title or right to any public land from an Indian. *Id.*

INDICTMENT.

1. An indictment found by a grand jury not legally selected, is invalid. *State v. McNamara*, 71.
2. An indictment which merely states that defendants did "attempt to take, steal, and carry away" certain chattels, etc., without setting out the acts done, or mode and manner of the attempt, is not sufficient under our statute to support the charge of "attempting to commit grand larceny." *State v. Brannan and Kelly*, 238.
3. That part of the indictment which, under the statutory form, first charges that a defendant has committed a certain crime, is merely formal; and if the body of the indictment sufficiently shows the offense charged, and the facts constituting the offense, it will be held good, notwithstanding any defect in the first clause. *State v. Anderson*, 254.
4. The first clause in the indictment may charge that the defendant has committed a certain crime, (giving its technical name, if it has one) or it may simply charge that he has committed a felony, or has committed a misdemeanor, as the case may be. It is not indispensable in this clause to give the name or description of the offense charged. Nor when the name and description is given, is it necessary to say whether it is a felony or a misdemeanor. *Id.*
5. The omission of the word *necessary* from the body of the indictment where the offense is charged, is not a fatal defect. To say a weapon is not drawn in self-defense, is a broader and stronger expression than to say it is not done in *necessary* self-defense. The latter is included within the former expression. *Id.*
6. Under the provisions of our Criminal Practice Act it is not necessary to use the exact words of the statute in defining a statutory offense. Words of similar import will suffice. *Id.*
7. The short form of indictment used in this case held to conform to the requirements of the statute. *State v. Millain*, 409.

8. That clause in the Constitution of the United States which declares "No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment," does not restrict the State Legislatures in prescribing the form of the indictment. It only requires that a Grand Jury should in some form express its approval of the prosecution before a party can be put on trial for such offense. *Id.*
9. Under the statute of this State any indictment which is good to sustain the simple charge of murder, is equally good to sustain a conviction of the higher crime of murder in the first degree. *Id.* 410.
10. The Legislature has absolute power over the subject of criminal proceedings, and may prescribe such forms of proceedings, indictment, etc., as it sees fit, except in those particulars where its power is restrained by some clause in the State or National Constitutions. There is nothing in either of those instruments which can prevent the Legislature from enacting that a party indicted for simple murder may be found guilty of murder in the first degree. *Id.*
11. Upon philosophical principles indictment for unlawful homicide should designate the grade of the offense committed, distinctly stating the facts which separate the offense charged from the next lower grade; but the Legislature may in its discretion dispense with all such distinctions, allowing a general indictment for unlawful homicide, and requiring the jury to find the grade of the offense in their verdict. *Id.*

INDORSEE.

1. Where a note is made by A to B, and by B indorsed to C, B is a regular indorser and entitled to all rights, and only subject to the liabilities of an indorser, although it may have been agreed in advance of the execution of the note that A was to make, and B to indorse the note for the benefit of C. *Heintzelman v. L'Amoroux*, 377.

INJUNCTION.

1. When a Court grants a temporary restraining order, and makes a rule on the defendant to appear at chambers and show cause why a *perpetual* injunction should not be granted, this, although irregular, is not injurious to defendant, if at chambers the injunction is made only to operate until a hearing on the merits. *Hawthorne v. Smith*, 182.

INSTRUCTIONS.

1. It is proper for a Court to refuse instructions containing correct principles of law, if there is no evidence before the jury making them applicable to the case on trial. *Sherman v. Dilley*, 22.
2. When a Court approves an instruction asked, and intends to give it, but by some oversight neglects so to do, it is just as injurious to defendant as if positively refused; and if the instruction is important, entitles the defendant to a new trial. *State v. McNamara*, 71.
3. Under our statute it is not necessary that the defendant should except to the action of the Court, in failing to give an instruction asked for. *Id.*

4. It is not error to charge a jury that they must find the prisoner guilty of murder in the first or second degree, or acquit, where there is no testimony offered which in any degree tends to show any fact or circumstances which could reduce the offense to manslaughter. *State v. Millain*, 410.
 5. A charge in the following language if not correct is too favorable to defendant: "If you believe from the evidence that about the nineteenth day of January last, at Virginia, Storey County, the defendant with malice aforethought, either express or implied, and with deliberation and premeditation, did unlawfully kill Julia Bulette with intent to take her life, it will constitute murder of the first degree, and you should so find; otherwise you will acquit." *Id.*
 6. Where there is no testimony tending to show the defendant guilty of an offense of a lower grade than the one charged, it is not error to instruct the jury they must find the prisoner guilty as charged or acquit him. If however there is any testimony tending to reduce the offense to a lower grade, the whole question should be submitted to the jury. *Id.*
 7. A mere expression of opinion by the Judge about evidence is not error when the jury are distinctly told they are the sole Judges as to the facts about which the opinion is expressed. *Id.*
 8. The word "inferred," as used in instruction, is synonymous with "implied" as used in the definition of murder. *Id.*
 9. The following definition of reasonable doubt is not erroneous: "By reasonable doubt is ordinarily meant such a one as would govern or control you in your business transactions in the ordinary pursuits of life." *Id.* 411.
 10. When an instruction has been given by the Court in clear and intelligible language on any point in the case with all proper qualifications, it is not error to refuse to repeat the same instruction in detached parcels, not properly qualified and made applicable to the state of the evidence before the jury. *Id.*
- Dissenting Opinion, per LEWIS, J.
11. It is error for a Judge to give his opinion to the jury as to the weight or sufficiency of testimony. In a trial for murder a Judge should not give it as his opinion to the jury that they should find the prisoner guilty of murder in the first degree, or acquit. The grade of the offense is a question of fact which should be left entirely to the jury. *Id.*
 12. An instruction in the following language is erroneous: "The testimony in this case tends to show the property of the deceased, or some portion of the same, in the possession of the defendant at a time subsequent to the alleged murder, and at quite a recent date." This instruction assumes that the property found was, or had been the property of deceased. The expression "tends to prove" only applies to the tendency of the evidence to show when the property was found, but does not apply to questions of ownership. *Id.* 412.
 13. The rule that a judgment must be reversed where instructions on a material point are contradictory, is not an absolute and unqualified rule. If one party asks for an instruction, which is given by the Court, laying down a rule of law in language too broad and unqualified, and the other side then asks an instruction, which is also given, qualifying and limiting the former instruction, and to some extent contradicting it; if the second instruction contains only sound law, the conflict between the two is not an error of which the party can complain

who obtained the instruction which was too broad and unqualified. *Lobdell v. Hall et al.*, 507.

14. Instructions given or refused by the lower Court will not be inquired into on appeal, unless the record shows that the giving or refusal to give them was excepted to at the time.—Per JOHNSON, J. *Id.*
15. Instructions given to a jury without objection are presumed to be with the consent of the parties, and such consent is a waiver of any right thereafter to question their correctness in that particular case.—Per JOHNSON, J. *Id.*

See JOINT INDICTMENT, 1.

INTERPRETATION.

1. The Court and not the jury must interpret written contracts. When the existence or nonexistence of certain extraneous facts must be ascertained to arrive at a correct conclusion, the Court may submit these facts to a jury. But where all the material facts are admitted by both sides, then the Court must decide. *McCurdy v. Alpha Co.*, 28.
2. UPON REHEARING.—The phrase "The interest herein intended to be conveyed," commented on and explained. *Id.*
3. When the Legislature, in granting a charter to a Gas Company, imposes upon the company, as one condition of the charter, the furnishing of a certain quantity of gas to the city, the law does not raise an implied promise on the part of the city to pay for that which the company are unconditionally required to furnish. *Virginia City Gas Co. v. Mayor et al.*, 320.
4. Per LEWIS, J.—When a Gas Company is required to furnish, free of cost, a certain quantity of gas for the first year, and a certain larger quantity for the second year, and so on to the end of its charter, and the law fixes the time when the gas works shall be finished, but does not fix the day when the furnishing of gas shall commence, the company shall have a reasonable time, after the gas works are finished, to lay pipe and prepare for distribution. *Id.*
5. The first year for distribution shall commence after the lapse of a reasonable time from the finishing of the works. *Id.*
6. Per JOHNSON, J.—When the company was bound to finish the works on or before a certain day, and the city was bound to furnish the burners, etc., the first year would commence when the city was ready to furnish the burners, provided of course that readiness must be either after the works were actually ready for the distribution of gas, or after the expiration of the time when the law required the works to be finished. *Id.*
7. If the city neglected to furnish the burners as soon as they were entitled to the gas, still they would only be entitled to the smaller quantity for one year from the time they furnished the burners. *Id.*
8. Per BEATTY, C. J., dissenting.—The company were bound to be ready to furnish gas from the period when the law required the works to be finished. On that day the "first year" commenced, during which they were bound to furnish the smallest quantity of gas. One year thereafter they were bound to be ready to furnish the increased quantity. If the city failed for six months of the first year to furnish burners, it lost the use of the smaller supply for that

period, but this did not postpone the period when the company was bound to commence furnishing the large supply. *Id.* 321.

9. Stipulations in regard to taking testimony should be interpreted liberally, to carry out the obvious intention of the parties, and in such way as not to defeat the ends of justice. *O'Neale v. Cleveland*, 486.
10. Interpretation may be aided by surrounding circumstances.

See DEED, 4.

INSTRUCTIONS, 10.

JOINT INDICTMENT.

1. When two parties are jointly indicted, but are tried separately, the acts and declarations of one cannot be given in evidence against the other, until some complicity has been shown between the two. And where such evidence was given, the defendant on trial was entitled to an instruction in the following language:
 "In considering this cause the jury must discard and disregard the conduct and sayings of O'Neil, unless the evidence shows beyond a reasonable doubt that the defendant had previously conspired to inflict an injury on the deceased, or to commit a public offense in the prosecution of which the deceased was slain." *State v. McNamara*, 71.

JOINT PROPERTY.

1. "Copartnership property and assets" is joint property, within the meaning of that term as used in Section 32 of the Civil Practice Act. *Whitmore v. Shiverick*, 288.

JOINT TENANT.

See PARTNER, 8, 8, 9.

JUDGMENT.

1. To make a former judgment, between the same parties, evidence in a subsequent suit, it must appear that the facts constituting the estoppel were actually passed on by the jury in the former case. *Sherman v. Dilley*, 21.
2. If the pleadings do not show it, parol testimony may be introduced to explain the record, and show that the identical point arising in the second suit was tried in the former. *Id.*
3. If no parol evidence be introduced, the record is only evidence of what is necessarily put in issue by the pleadings. *Id.*
4. When a plaintiff in ejectment avers title and right of possession in himself, and the defendant denies both these allegations, and on the other hand avers title and right of possession in *himself*, here it would seem, *prima facie*, that the title was in controversy. The judgment, in such case, would operate as an estoppel in any future litigation between the same parties, unless it should be shown that one of the parties was prevented from making his title available in the former suit by some temporary impediment, such as an outstanding lease or license, or that he had acquired some new title since the former judgment. *Id.*

5. The common law doctrine, that a judgment in ejectment cannot be pleaded in bar or given in evidence by way of estoppel, arises from the fact that this action at common law is between fictitious persons, and has no applicability to our action for possession of real property, which is more like the writ of entry or assize than the old action of ejectment. Our action, although called ejectment, seems to combine the properties of a writ of assize, of entry, and of right, and as such a judgment in an action is an estoppel in regard to all titles litigated therein. *Id.* 22.
6. A judgment cannot be pleaded in bar, or proved as an estoppel, whilst it is pending on appeal. *Id.*
7. UPON REHEARING.—The object of Sec. 32 of the Practice Act was to make the property of all partnership associations and joint associations liable on judgments obtained upon service of one member of the association. *Whitmore v. Shinerick*, 289.
8. Where there is a joint judgment in ejectment against several, a reversal as to one of the defendants necessarily reverses it as to all. *Bullion Mining Co. v. Cræsus Gold and Silver Mining Co.*, 336.
9. An erroneous judgment may become valid and binding by lapse of time. No Appellate Court will take any active or positive steps to affirm such judgment. *Id.*
10. An Appellate Court certainly has the power to reverse an erroneous judgment rather than to modify it. If an order is made reversing a judgment, the term expires and the remittitur is sent to the Court below, it is then too late to ask this Court to change its order so as to modify the judgment of the Court below, rather than to make it an unqualified reversal. *Id.*

See PARTNERS, 5, 6, 7.

PLEADINGS, 11, 12.

JUDGE'S SALARY.

See CONSTITUTIONAL LAW, 7.

JURISDICTION.

See CORPORATION, 4.

AMENDMENTS OF RECORDS.

JURORS.

1. When a juror was selected and placed on the jury list, and summoned to attend as a juror under the name of E. Barry, but whose true name was E. Berry, or Edward Berry; the variance in the name would be immaterial, if it satisfactorily appeared that the person attending as a juror was the one really selected. But, *quere!*—Was the statement of the Judge to this effect sufficient evidence of the fact? Should there not have been the affidavit of at least one of the officers who selected the juror to this effect? *State v. McNamara*, 71.
2. If a disqualified juror is forced on a trial jury against the protest of one of the parties, we may reasonably infer injury resulted from such an error. *Fleeson v. Savage Silver Mining Co.*, 157.

3. If a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured. An injury could only arise in case he was compelled to exhaust all his peremptory challenges, and afterwards have an objectionable juror placed on the panel for want of another challenge. *Id.* 158.
4. When only one peremptory challenge is shown to have been used, the Court will presume the other three were not used. *Id.*
5. Where a juror is challenged for cause, that challenge is erroneously overruled, and the challenging party afterwards moves for a new trial on the ground that he was forced to exhaust his *peremptory challenges* on this juror, this assignment of error negatives the idea of the juror having served on the panel. *Id.*
6. A mere suspicion on the mind of a juror that the defendant is guilty does not disqualify him from sitting on a petit jury, especially if that suspicion mainly arises from the examination to which he is subjected by the prisoner's counsel touching his qualification as a juror. It is only an unqualified opinion that disqualifies. *State v. Millain*, 409.
7. "Unqualified opinion or belief" commented on. *Id.*
8. A challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge or other facts on which the challenge is based. *Id.* 411.

See STOCKHOLDER, 1.

JURY.

1. A jury drawn whilst the Court was in session, in the presence of the Court and its officers, must be held to have been drawn in open Court, whether it was done in the room where the Court usually sits or in any other room of the Court House building. *State v. Millain*, 409.

JURY TRIAL.

See CHANCERY PRACTICE, 8.

LAND.

See CORPORATION, 8-14.

LAW AND FACT.

1. Can this Court reverse a judgment in a criminal case because the evidence is *insufficient* to sustain the verdict? If there be any evidence, does it not become a matter of fact and not of law merely? *State v. Millain*, 411.

See INSTRUCTIONS, 7, 10.

LEGAL TENDER NOTES.

1. In the payment of a debt, legal tender notes are in contemplation of law equal to coin; an Act of the Legislature, therefore, making the salary of a State officer payable in legal tender notes after it had previously made it payable in coin, is not rendered unconstitutional by that section of the Constitution which declares that the salaries of certain officers shall not be increased or diminished during the term of office. *Beatty v. Rhodes*, 240.

LEGAL PRESUMPTION.

See MURDER, 5.

LEGISLATURE.

See CONSTITUTIONAL LAW, 6.

LIMITATION, STATUTE OF.

1. Section 21 of the Statute of Limitations does not in any way qualify Section 5 of the same Act. *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 361.
2. Section 5 prescribes the general rule as to limitations of real actions or actions for the possession of real estate, and Sections 14 and 15 declare the only exceptions to that rule. *Id.*
3. Section 16 declares the limitation in personal actions, and Section 21 the exceptions to the general rule. *Id.*
4. A has been for five years in constant use of a piece of land as a road. This shows a *prima facie* right to use it as such. B fences up the road, and when sued says: "I appropriated this land seven years since." This is not a good defense, because he does not show he has been in possession within five years. *Id.*

See BONDS, 1, 2.

MANDAMUS.

1. As the affidavit on which an alternative writ of mandamus issues is required to be served with the writ, and it is the affidavit and not the writ which is required to be answered, it would seem unnecessary that the latter should contain all the allegations of the affidavit. *State ex rel. v. McCullough*, 202.
2. The power conferred on this Court by the Constitution to issue writs of mandamus, *quo warranto*, etc., is an original jurisdiction, and not merely auxiliary to its appellate jurisdiction. *Id.*
3. There being no other speedy and adequate remedy for the relator, mandamus is the proper remedy in the case made. *Id.*
4. Mandamus is the proper remedy to put one into an office where the title of the relator is clear, and no other person is claiming the office under color of right. *Id.*
5. Where the affidavit for an alternative writ of mandamus shows that the relator was appointed to a certain office, or agency, by the board of trustees of a foreign corporation, at a meeting of such board, legally called, an answer denying the legality of the call, appointment, etc., without stating any facts to show the illegality of the call, the meeting, and action of the board, raises no issue of fact, and is a mere nullity. *Id.*
6. It being shown by the affidavit and answer that the relator was entitled to the office when he applied for the alternative writ, and also when the original answer was filed he is entitled to his costs incurred up to that time. *Id.*
7. A supplemental answer having shown that relator was legally removed from office, and defendant appointed since the filing of the original answer, the peremptory writ must be refused. *Id.*

See WRIT, 1.

MALICE AFORETHOUGHT.

See MURDER, 2.

MARRIED WOMAN.

See TRUSTEE.

METES AND BOUNDS.

See ASSESSMENT, 4, 5, 7.

MINES, PRODUCTS OF.

See TAXATION, 2.

MONEY.

See LEGAL TENDER NOTES.

MORTGAGES.

1. In a mortgage of personal property, the title passes to the mortgagee, subject to defeasance upon payment of the debt, and after breach of condition he has the absolute right, after due notice, to sell the property at public or private sale. *Bryant v. Carson River Lumbering Company*, 313.
2. The purchaser of personalty sold by a mortgagee gets a perfect and indefeasible title. There is no right of redemption from such purchaser. That right only exists for a reasonable time after breach as against the mortgagee, who has not sold the property. *Id.*
3. The fact that the purchaser knows that his vendor is only a mortgagee, makes no difference as to the character of title acquired by the purchase. *Id.*
4. The section of the Practice Act which declares there shall be but one form of action to foreclose a mortgage, does not deprive a mortgagee of his right to sell without action. *Id.*
5. Whether a mortgagee can sell without notice given—*Quere?* *Id.*
6. A mortgage of personal property without delivery, is good as between the parties. *Id.*

See TRUSTEE, 2.

PARTIES TO BILL IN EQUITY, 1.

PAROL TESTIMONY, 5.

CHANCERY PRACTICE, 4.

PARTNERS, 4.

MURDER.

1. Length of time for deliberation is not an essential ingredient in murder in the first degree. It is sufficient if the design to murder was formed before the striking of the fatal blow. *State v. Millain*, 410.
2. Where there is a preconceived design to commit some felony other than murder, and the result of the attempt, unintentional on the part of the felon, proves fatal to a human being, this premeditated felony would make *malice afore-*

thought at common law. But this would not be willful, deliberate, premeditated killing under our statute, because of the absence of intent to take life. *Id.* 411.

3. When a killing has been shown, the presumption arises that a murder has been committed. But there is no presumption that it is murder in the first degree in a case of this kind. If the defendant claims that it is only manslaughter, the proof devolves on him to show the circumstances, thus reducing the grade of offense. If the prosecution claims that it is murder in the *first degree*, it devolves upon the State to show the aggravating facts. *Id.*

See INDICTMENT, 8, 9, 10, 11.

INSTRUCTIONS, 4, 5, 6, 9.

NEW TRIAL.

1. To justify a new trial on the ground of newly discovered evidence, three things must be shown: first, materiality of evidence; second, it could not by due diligence have been produced at the first trial; third, that it is not cumulative. *Howard et al. v. Winters*, 539.
2. To justify the granting of a new trial on the ground of newly discovered evidence, the party applying for the relief should show clearly that the failure to produce evidence on the first trial was not the result of negligence on his part. *Id.*

See CHANCERY PRACTICE, 1.

STATEMENT, 2, 5, 6, 7.

OCCUPANT.

See STATE LANDS, 1-7.

OFFICE—OFFICER.

1. A person holding the office of United States District Attorney, on the day of election, is incapable of being chosen to the office of Attorney General of the State. *State ex rel. Nourse v. Clarke*, 566.
2. Section 9 of Article IV of the Constitution of Nevada, which declares "that no person holding any lucrative office under the Government of the United States, or any other power, shall be eligible to any civil office of profit under this State," is not confined to members of the Legislature, but is applicable to all officers of State. *Id.*
3. A person holding a civil office under the United States, can resign such office without the consent of the appointing power, or the acceptance by it of such resignation. It is not in the power of the Executive to compel any civil officer to remain in office. *Id.*

See CORPORATION, 2, 3, 4.

MANDAMUS, 4, 6.

OPEN COURT.

See JURY.

PAROL TESTIMONY.

1. Parol evidence cannot be heard to prove that a bill of sale, (under seal) absolute on its face, was intended merely as an assignment in trust for the benefit of grantor's creditors, unless in case of fraud or mistake. *Feusier v. Sneath*, 120.
2. Parol evidence that an absolute deed for land was intended as a deed in trust for grantor's creditors, is liable to two objections: first, the same as that in regard to the bill of sale under seal; second, it would be establishing a trust by parol, which is in violation of the sixth section of the Statute of Frauds of California, where the land is located. *Id.*
3. If the bill of sale and conveyance of the land were procured by fraudulent representations that they would be held in trust for all the creditors, these fraudulent representations might be proved, and a trust would thereby be established. *Id.*
4. To prove that a deed, absolute on its face, was given as a deed in trust, is not to prove a new and distinct contract, but is to vary and contradict the terms of the deed. *Id.*
5. The rule that a deed, absolute on its face, may be proved to have been given as a mortgage, is an exception to the general rule, rests on peculiar reasons, and the proof to be introduced is of a peculiar nature. *Id.*
6. Courts of Equity may inquire into the objects which induced parties to enter into contracts, and may prevent a fraudulent use being made of them. *Id.*
7. When there is an attempt to show that the object of a deed is different from that expressed on its face, the proof must be clear and conclusive; and there must also be satisfactory evidence that one of the parties has committed, or is attempting to commit some fraud, before the Court will interfere. *Id.*
8. It is not error to allow a witness to say that defendant's agent agreed to give him an order of a certain character. To say that the agent did give him an order which he passed over to another party, was not proving the contents of a writing by parol. The witness did not attempt to prove the contents of the instrument, or even that he had read or knew its contents. *O'Neil v. N. Y. & S. P. M. Co.*, 141.
9. When C. & S. contracted with F. & P. by written contract to run a certain tunnel, it was not contradicting the writing to show in a controversy with an employer of C. & Co. that C., in conjunction with G., M. & P., partners, doing business under the firm name of C. & Co., did actually prosecute the work, and that S. had no concern or participation therein. *Sargent v. Collins et al.*, 280.

See JUDGMENT, 2.

PARTIES TO BILL IN EQUITY.

1. When a mortgage is executed by a trustee upon the trust estate, the *cestui que trust* is a necessary party to a suit for foreclosure, and if the *cestui que trust* is a *feme covert*, her husband is also a necessary party. *Mavrich v. Grier et al.*, 52.

PARTITION.

1. When a proceeding for partition of realty is had in a Court of Equity, the Court will not only proceed to divide the land, but will, in a proper case, direct an accounting, and do equity in the case by making parties account for rents, etc. *Dall v. Confidence Co.*, 531.
2. When a bill is filed for a partition of realty, the Court should not decree a sale except in those cases where a partition would manifestly be injurious to the interests of the cotenants. *Id.*
3. Under our statute, if any one or more of the cotenants files an affidavit showing that a sale of an entire mining claim would be injurious to him or them, the Court must proceed to divide the claim as prescribed by statute. A sworn answer setting up the same matter is equivalent to the affidavit required by the statute. *Id.*
4. Whether one tenant in common of a mining claim will be allowed compensation for labor or money expended on the common property in developing it—*quere?* If such compensation is to be allowed, it must be for work done on the common property. *Id.*
5. It could not be allowed for developments made on an adjoining claim, which incidentally enhanced the value of the common property. *Id.*

PARTNERS.

1. A party can only be bound on a note executed in a firm name who is actually a member of the firm executing the same, or has held himself out as a member so as to give the firm credit on his responsibility. *Sargent v. Collins et al.*, 260.
2. The fact that C. & S. entered into a written contract with F. & P. to excavate a certain tunnel, is not conclusive evidence that S. was a member of the association known as C. & Co., who did actually prosecute the work on the tunnel. C. & Co. may have been subcontractors under C. & S. *Id.*
3. Partners are *quasi* joint tenants, the survivor having a peculiar, qualified survivorship. *Whitmore v. Shiverick*, 288.
4. A partner cannot sell his interest in partnership property so as to deprive his copartners of their lien thereon for partnership liabilities. Nor can a mortgage executed by one partner have such effect. *Id.*
5. Where A, B, C and D are sued as partners doing business under the name of A & Co., the summons is served on A only, and under our statutory provisions judgment is taken upon default against A, and against the joint property of A & Co. This judgment is not defective as against the property of A & Co., because it turns out that the firm was composed of only A, B & C. *Id.* 289.
6. A judgment against the joint property of A & Co. would not affect the interests of D if he was not a member of that company. *Id.*
7. As the law stood when this judgment was rendered, a firm or joint stock company could not be sued by the company name. But the suit being brought in the ordinary form, the judgment might go against one or more of the associates who were served with summons, and a sort of judgment *in rem* against the joint property of the association. *Id.*

8. Partners may acquire property as joint tenants or as tenants in common; but whatever may be the technical terms of the deed, courts of equity will treat it as partnership property, or in other words, a personal property, wherever it has been acquired with partnership funds for partnership purposes. *Id.*
9. Partners are joint tenants of personal property, with only a qualified right of survivorship, and in equity they stand in the same relation in regard to real estate. *Id.*
10. Under the provisions of Sec. 32, one partner who is served must answer for all the partners or joint debtors who are sued, so far as the partnership or joint property is concerned. *Id.*

See PRACTICE, 18.
JUDGMENT, 7.

PEACE—PURCHASE OF.

See COMPROMISE, 2.
COVENANT OF TITLE, 2.

PERSONALTY.

See FIXTURES, 2, 3, 4, 5.
MORTGAGE, 6.

PLEADING.

1. The pleading in this case is good as an action upon contract.—Per BEATTY, C. J. *Prescott et al. v. Wells, Fargo & Co.*, 82.
2. The breach in this case is not exactly in the language of the contract, but seems to be substantially correct. That breach is not denied in the answer. *Id.*
3. There was no necessity of alleging the value of the fixtures. The plaintiffs only had to allege the extent of the damage they sustained in consequence of not being permitted to remove the same. *Id.*
4. Where a complaint in the nature of a bill in equity sets out distinctly most of the facts necessary to entitle the plaintiff to the relief sought, but omits one or two material allegations or facts, and these facts are clearly stated and admitted in the answer, the answer may be held to aid the complaint and sustain the action. This was so under the former Chancery practice, and is more especially the case under the liberal rule prescribed by the seventy-first section of the Practice Act. *Hawthorne v. Smith*, 182.
5. An express promise to pay a certain sum of money as damages for a tort previously committed would create a contract upon which an action might be maintained; but the law does not presume a promise to pay from the tort itself. *Knickerbocker v. Hall*, 194.
6. It is as necessary, under our system of practice, to maintain in pleadings the distinction between actions arising out of torts and those growing out of contracts, as it was under the old practice. *Id.*
7. If the pleading be upon contract, a recovery should not be allowed if the proof be of a trespass, from which there could be no presumption of a contract. *Id.*

8. When A contracts to deliver to B, at his steam-mills, all the wood necessary to run them for a definite time, and C guarantees the payment for the wood thus delivered, in an action against C, the guarantor, it is not sufficient to allege that wood of a certain value was delivered to B, but it must also be alleged that the quantity delivered was used or needed to run the mills; for this is the extent of the guarantor's liability. *Horton v. Ruhling*, 498.
9. When upon the trial of a cause in the Court below it appears that the plaintiff's complaint is so defective as not to state a cause of action, that Court should either grant leave to plaintiff to amend his complaint, or dismiss the action without prejudice. If the judgment in such case should be on the merits, upon the bringing of a new action embarrassing questions might arise as to how far the former judgment would be available as a plea in bar. *Id.*
10. New matter in avoidance of a *prima facie* case made out by plaintiff should be specially pleaded, and no proof of such facts can be heard unless specially pleaded. *Id.*
11. In pleading the judgment or other determination of a Court of limited jurisdiction, it is made necessary by the Practice Act of this State to allege that such judgment or determination was duly given or made. *Keys v. Grannis*, 548.
12. Without such allegation in the pleading, proof of the judgment or proceedings of such Court would be inadmissible. *Id.*

POSSESSION OF REALTY.

See COMPROMISE, 2.

POSSESSION OF PERSONALTY.

See STATUTE OF FRAUDS, 1.

POSSESSORY CLAIM—TAXATION OF.

See ASSESSMENT, 1, 2.

PRACTICE.

1. Where a case is tried by a Judge without the intervention of a jury, and there is an evident error in the calculations of the Judge, upon his own theory of the case, this would entitle the appellant against whom the mistake is made, either to a reversal or modification of the judgment. When this Court cannot see clearly what the judgment should have been, the case will be reversed. *Feusier v. Mayor et al.*, 58.
2. Where one person (John Doe, an unknown owner) is sued as the owner of a large number of lots which are delinquent for taxes, and the suit is also *in rem* against the lots, only one copy of the summons should be posted at the courthouse door to give notice to John Doe, and one copy posted on each of the lots to support the proceeding *in rem*. *Id.* 59.
3. The Sheriff being directed to follow the direction of the Revenue Law, could only charge for one copy of summons for John Doe, and one for each lot served. *Id.*

4. Mileage should only be charged for the necessary distance traveled to reach each lot, supposing the officer to start from the court-house—travel to first lot, then to second, and so on to the end of the day. *Id.*
5. The law only requires three notices of sale to be posted, and no more could be charged for. *Id.*
6. A direction by the attorney of the city to the Sheriff to follow the General Revenue Law, in making service of summons, and notice of sale, did not justify the Sheriff in following the custom of other officers who had been in the habit of performing unnecessary services in order to extort illegal fees. *Id.*
7. Where the law clearly points out to an officer the mode of service, we will not believe, on ambiguous and uncertain testimony, that the attorney of the city gave him directions to serve summons, notices, etc., in such manner as could have answered no other purpose than to run up an extortionate bill against the city. If such absurd directions were given, it would be for the Court or jury to determine whether they were, or not, the result of a fraudulent combination against the city. *Id.*
8. *Quere?*—If the Sheriff undertook to perform these services under the provisions of the General Revenue Law, which provides that the Sheriff shall when performing such services for the State, receive no fees except in those cases where they are collected from the defendants, is he not bound by this same condition when performing services for the city? *Id.*
9. When a case comes up on statement for a new trial which has never been settled by the Court or agreed to by the parties, this Court cannot look into the evidence and other matters set out in the statement; it will be confined to an examination of the judgment roll. *Lockwood v. Marsh*, 138.
10. When an application is made for a continuance on the ground of the absence of a witness, it is certainly in the discretion, if it is not the absolute duty of the Court under our statute, to deny the application when the party opposing the motion will admit that the witness, if present, would swear to the facts as set out by the party applying for the continuance. *O'Neil v. New York and Silver Peak Mining Co.*, 141.
11. Causes should not be reversed for trivial errors which could not be reasonably supposed to lead to any injurious result. *Fleeson v. Savage Silver Mining Co.*, 158.
12. ON REHEARING.—The mere expression of an erroneous opinion during the progress of a trial by the Judge of a *nisi prius* Court, will not be cause for reversing a judgment. It must be shown that some result injurious to the appellant followed that opinion. *Id.*
13. Where an erroneous ruling of a Court on the trial of a cause might reasonably be followed by one or the other of two results—the one perfectly harmless, and the other injurious to the appellant—the record must show which result did follow, or this Court cannot reverse the judgment. *Id.*
14. The admission of hearsay evidence about a point which was immaterial and which could, by no possibility, have injured appellant, will not be ground for reversing a case. *Beatty v. Sylvester*, 228.

15. When a party makes out a good *prima facie* case for a continuance on account of the absence of a material witness, the Court is not justified in refusing the continuance because it may imagine the possible existence of facts which, if shown, would have been sufficient in avoidance of the case made by the party moving. *Id.*
 16. When the Court below errs in refusing a continuance, and an exception is taken and made a part of the record by regular bill of exceptions, signed by the Judge, there is no imperative necessity for a motion for a new trial, to bring the point before this Court. *Id.*
 17. A trifling variation between *allegata* and *probata* is not material where the facts constituting a proper defense are substantially stated. *Whitmore v. Shiverick*, 289.
 18. When a party makes his defense to an action upon the ground that he acquired the property in controversy under an execution against A & Co., and in stating who composed that firm includes the name of one party who was not a member of the company, this is an immaterial variance. *Id.*
 19. When a finding of facts is defective, it must be excepted to in the Court below, or this Court will not reverse the case for such defect. *Id.*
 20. Counsel have the privilege of choosing the order in which they will introduce their proofs. But if documentary evidence is offered, which can only become relevant by the introduction of other connecting proofs, the Court may well refuse to receive such evidence until counsel will at least assert that they expect to introduce the connecting evidence. *Wright v. Cradlebaugh*, 342.
 21. To file an answer to a complaint and then move for judgment on the pleadings is an irregular practice, and ought not to be encouraged. *Lake Bigler Road Co. v. Bedford*, 399.
 22. If the complaint is defective, the proper mode to reach it is by demurrer; then, if the defect be amendable, the plaintiff has, as he ought to have, the opportunity to amend. *Id.*
 23. If however the complaint is fatally defective in not stating a cause of action, such a judgment must be sustained. *Id.*
- Per JOHNSON, J., dissenting.
24. An objection to the introduction of evidence should specify specifically the ground of objection; therefore, objecting to the introduction of evidence upon the general ground of irrelevancy, in that it is inadmissible under the pleadings, is not sufficiently specific. *Keys v. Grannis*, 548.

See MANDAMUS, 8, 7, 9.

PARTNER, 10.

VERIFICATION, 8.

DEFAULT, 4.

RULE OF COURT, 4.

INSTRUCTIONS, 10.

STATEMENT, 6, 7.

STATE LANDS, 8.

PLEADING, 9.

PRACTICE, PROBATE COURT.

See PROBATE COURT.

PRESCRIPTION.

1. Even if one appropriating public land for a road could not be held as having appropriated land, still a five years' uninterrupted enjoyment of the right of way would establish a prescriptive right to continue to enjoy the same. *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 361.
2. A person assuming to have the right of way and continuously exercising that right for a period of five years without consulting the owner of the soil or asking his permission, must be considered as holding adversely. *Id.*
3. A party who relies on a prescriptive right of way need not, when he is sued for a disturbance, aver in his complaint *in hæc verba*, that he enjoys the right of way by *prescription*. It will be sufficient for him to aver that he has enjoyed the right of way for a period long enough to have established that right. *Id.*

PROBATE COURT.

1. Although the same Court has jurisdiction, under our system, of cases at law, in equity and in matters of probate, yet the several classes of cases must be kept separate, and a petition to the Court of Probate cannot be confounded with an action at law or a suit in Chancery. *Lucich v. Medin*, 93.
2. This is a petition to the Probate Court, and if treated as a bill in equity there would be a fatal objection to it. To wit: that it was a bill filed to surcharge and falsify the accounts of an executor who had not yet made a final settlement. *Id.*
3. An error in the names of the petitioners in a case in probate pending and undetermined, may be corrected. It is not such a fatal error as would be the bringing of a suit in the name of the wrong parties. *Id.*
4. Sec. 239 of the Probate Act seems to provide that what is settled at one settlement of an executor's account shall not be open to resettlement at any future time in the Probate Court. *Id.*
5. The rule that a Probate Court cannot reinquire into that which has once been settled, only applies to those items of account which were properly before the Court for adjustment. The general result at which the Probate Court arrives is immaterial. It is only as to the items of account acted on that the doctrine of *res adjudicata* applies. *Id.*
6. It has been held, a mistake in a former settlement may be corrected in a subsequent one. The only difficulty in applying this rule is, to determine what shall be treated as a mistake, and what shall stand as *res adjudicata*. Perhaps the best rule is to say, everything may be corrected which shows on its face the mistake, or error. This would allow the Court, before final settlement, to correct its own errors of judgment, but not to go *de novo* into proof of items already passed on. *Id.*
7. ON REHEARING: *Held*, a Probate Court may correct its own errors in the settlement of estates, either in regard to matters of law or fact, at any time before final settlement, provided such corrections can be made from the record without opening the proof in the case. *Id.* 94.

8. What appears on the face of an account and interlocutory decree to have been once settled must remain closed, unless the record itself discloses some error. *Id.*
9. Passing an account with a certain item as a credit thereon in favor of the estate, would not preclude proof in a subsequent settlement of another item of credit in favor of the estate which was not on the first account. Nor would a general entry in favor of the estate of so much money received from rents, preclude those interested in the estate from showing that other money was on hand besides that reported. Nor that the several sums received for rent would amount to a greater sum than that entered. The account of an executor or administrator must show the items of account, and not merely the general result of certain transactions. *Id.*

PROCESS.

1. Where property is taken from the possession of a stranger to the suit, who claims title by means of purchase from the defendant in such process, and such sale is valid and good between the parties to it, but void only as to creditors, the officer can justify the taking in such case only by showing that he represented a creditor, and that the writ under which he seized that property was regularly issued. As a general rule, process regular on its face and issued by a tribunal or officer having authority to issue it, is sufficient to protect the officer, although it may have been wrongfully issued. But when the officer attempts to overthrow a sale by the debtor, on the ground that it was fraudulent as to creditors, he must go back of his process and show the authority for issuing it. *Keys v. Grannis*, 548.
2. If however the sale by the debtor were simply colorable, or only a transfer of the possession merely for concealment, with no intention of transferring the title, the writ alone, if regular on its face and emanating from a tribunal having jurisdiction of the subject matter, will be a full protection to the officer—an action by one so holding possession of the debtor's property. *Id.*

PROOF.

See DAMAGES.

PROSECUTOR.

1. A prosecutor is "one who prefers an accusation against a party whom he suspects to be guilty." A party who appears in response to a subpoena is not a prosecutor, but only a witness. *State v. Millain*, 409.

See GRAND JURY, 2, 3, 4, 5.

PUBLIC LANDS.

1. The law of 1861, in regard to surveys of public land, has been repealed. The tenth and thirteenth sections of that Act are unconditionally repealed, without any qualification. *Whitman Silver Mining Co. v. Baker et al.*, 386.

See APPROPRIATION, 1.

REALTY.

See FIXTURES.

REASONABLE DOUBT.

See INSTRUCTIONS, 9.

REASONABLE TIME.

See INTERPRETATION, 4, 5.

RECORD.

See AMENDMENT OF RECORDS.

REDEMPTION.

See MORTGAGE, 2.

REPLEVIN.

1. In an action of replevin it is not indispensably necessary to show a demand upon the defendant to return the property before suit brought. A demand serves no purpose, except to establish a conversion or a wrongful detention. When that can be established without showing a demand, a demand is unnecessary—Justice JOHNSON dissenting. *Perkins v. Barnes*, 557.
2. When, therefore, the defendant in his answer admits the detention and claims title in himself, the title alone is put in issue, and no demand need be shown—Justice JOHNSON dissenting. *Id.*

RES ADJUDICATA.

1. The ruling of a Court in regard to a mere interlocutory order cannot be held as *res adjudicata*. *Whitman Silver Mining Co. v. Baker et al.*, 387.

REVENUE LAW.

1. Under the Revenue Act of this State, *held*, that the Auditor, Assessor and Tax Collector are preferred creditors, and entitled to their pay for assessing and collecting the taxes, before the money collected is distributed among the several funds to which it properly belongs. *Grimes v. Goodall*, 79.

REVERSAL.

See JUDGMENT, 8, 9, 10.

ROAD.

1. Road and way are not synonymous terms. Way and right of way are nearly synonymous; but the word road is frequently used to mean the land over which a public or private way is established. *Chollar-Potosi Mining Co. v. Kennedy et al.*, 361.

See PRESCRIPTION, 1, 2, 3.

RULE OF COURT.

1. When one obtains possession of property by a fraudulent use of a rule of Court, it is the duty of the Court to remove him and restore the possession to the former occupant. *Winters v. Helm et al.*, 394.

2. Even if the possession is voluntarily surrendered to the claimant under the rule, to hold whilst the occupant goes to consult his principal or legal adviser as to whether it is his duty to surrender the property in obedience to the rule served, and the party who thus gets temporary possession by means of and in consequence of the rule, afterwards fraudulently refuses to yield up the possession thus obtained, it is equally the duty of the Court to restore the possession. *Id.*
3. When the Court restored the possession thus fraudulently obtained to a corporation upon a petition signed and sworn to by the party actually ousted, this Court will not reverse the judgment because of there being no sufficient evidence that the party actually ousted was the agent or servant of the alleged corporation. *Id.*
4. The person who obtained or retained possession by fraud was properly ousted, and it does not lie in his mouth to say the wrong person was put in possession. *Id.*

SALARY.

See CONSTITUTIONAL LAW, 7.

SALE OF PERSONAL PROPERTY.

See STATUTE OF FRAUDS, 3.

SHERIFF'S FEES.

See PRACTICE, 1-8.

CORPORATE POWERS, 1, 2.

STATE LANDS.

1. "Occupant" and "party in possession" as used by the Legislature in the Act in regard to the "Selection and Sale of Lands, etc.," are not strictly synonymous. Occupant means one dwelling upon and occupying a part of a tract of land; it does not necessarily imply that the party is in possession of the whole. *O'Neale v. Cleveland*, 485.
2. Section 11 in this Act if construed by itself would be held to confer a preferred privilege on the occupant to purchase the entire sixteenth or thirty-sixth section upon which he might have an occupancy; but taken in connection with other sections it is clear that the Legislature only intended to give this preferred right to the extent of either one hundred and sixty or three hundred and twenty acres. *Id.*
3. Lands selected in lieu of sixteenth and thirty-sixth sections are to be disposed of in accordance with the provisions of Sections 12 and 21 of this Act. *Id.*
4. The twelfth section was intended by the Legislature to give a preferred right to the actual occupant. But the extent of that preferred right not being shown in Section 12, we have to resort to Section 11 and other portions of the Act to ascertain the extent or quantity of land to be affected by this preferred right. That quantity cannot be less than one hundred and sixty acres. *Id.*
5. Section 12 gave first a preferred right to the actual occupant; next, if no claim was asserted by an actual occupant, then to any person who had applied to locate a land warrant, on land selected in lieu of the sixteenth and thirty-sixth sections. This view of the twelfth section is confirmed by an examination of the provisions of the twenty-first section. *Id.*

6. Section 21 taken in connection with other portions of the Act indicates: First, that an occupant shall have a preferred right of purchase over all other persons; second, that right shall be limited in quantity to one hundred and sixty or three hundred and twenty acres; third, actual occupancy of any portion of the section would give a preferred right to at least one hundred and sixty if not to three hundred and twenty acres; fourth, the purchase should be within the time limited to other preferred purchasers. *Id.*
7. Persons who became occupants (before selection) of land afterwards selected in lieu of sixteenth or thirty-sixth sections, are entitled at their option to buy the same at one dollar twenty-five cents per acre, although they may have previously purchased a land warrant to locate the same lands. *Id.* 486.
8. The seventh section of the land Act which provides for taking testimony before a Commissioner, was not intended to prohibit the Judge hearing such testimony when convenient to himself and preferable to the parties. *Id.*

STATEMENT.

1. When a party in assigning errors, or stating the grounds on which he will move for a new trial, says that the Court erred in doing a certain thing, this is no evidence that the Court did as charged. To establish that fact, it must appear in the statement of facts. The assignment of errors, and the statement of the facts or evidence to sustain these alleged errors, are separate and distinct things. The party moving for a new trial may state the errors complained of in his own language. Neither the Court nor the opposite party can correct that. The Court can only correct the statement of facts or evidence. *Fleeson v. Savage Silver Mining Co.*, 158.
2. When there is a statement on appeal from the judgment, and subsequently a statement on appeal from an order overruling a motion for a new trial, each statement must be considered separately, and portions of one cannot be taken to aid the other. *Whitmore v. Shiverick*, 288.
3. It would be error to grant a new trial where there is no affidavit and no statement in support of the motion for that object. *Id.*
4. A statement on appeal must be made within twenty days after judgment, and if a sufficient statement be not made within that time it cannot be subsequently made. *Id.*
5. This Court will not reverse a judgment because the verdict or finding of facts is not sustained by the evidence, unless the appellant has made his motion and statement on motion for a new trial in the Court below. *Id.*
6. Where there is a statement on motion for new trial, and the moving party appeals from the order refusing a new trial, the case comes before this Court on the same statement on which the Court below acted, and there is no necessity for a statement on appeal. *Bryant v. Carson River Lumbering Co.*, 313.
7. When there is a statement on motion for a new trial, there need be none on appeal. *O'Neale v. Cleveland*, 486.
8. The admission by respondents' attorney that a statement on motion for new trial is correct, does not admit such statement to contain all the evidence offered in the case, where the statement itself does not purport to contain it all. It can only be held to be an admission that so far as the evidence is stated, it is

stated correctly. It does not negative the idea of other evidence having been given. *Howard et al. v. Winters*, 539.

9. Per BEATTY, C. J.—When the particular point on which there is claimed to be a defect of evidence is stated in the motion for a new trial, and an attempt made to state the evidence bearing on this point, and that statement is submitted to the opposite party who either amends or agrees to the statement as made, the Court should give a liberal construction to the statement and presume it contains all that either party considered material in regard to that particular point. *Id.*

See PRACTICE, 9.

EXCEPTIONS, 1, 2.

STATUTE OF FRAUDS.

1. When R loaned money to M for the purchase of cattle, with an agreement that R was to have a lien on all the cattle purchased until her loan was repaid, this does not vest any title to the cattle in R, as they are purchased. Her lien in such case could only be made good by taking possession before attachment by other creditors. *Reed v. Ash*, 116.
2. Where the vendee of goods, in consideration of the sale, undertakes to pay certain debts to the creditors of the vendor, this is not undertaking to answer for the debt or default of another, but only to pay his own debt in a particular manner. *Alcalda v. Morales*, 133.
3. When A contracts to make a certain number of bricks for B, and deliver them to him at a certain price, B to select the spot where, and the clay out of which the bricks are to be manufactured: this is a contract rather for the manufacture than sale of brick, and does not come within Section 62 of the Act in relation to Conveyances, &c., requiring contracts for the sale of goods to be delivered in future to be in writing. *O'Neil v. New York and Silver Peak Mining Company*, 141.

See PAROL TESTIMONY, 2.

MORTGAGE, 6.

STOCKHOLDER.

1. Under the Act of this Territory passed in 1862 for the Formation of Corporations, &c., stockholders were made personally liable for their portion of all debts contracted whilst they were members of the corporation. Consequently, one who was a stockholder when a suit was commenced against a corporation would be liable for his share of any costs incurred whilst he remained a stockholder, and would be disqualified as a juror. *Fleeson v. Savage Silver Mining Company*, 157.

STOLEN PROPERTY.

2. The fact that stolen property is found soon after the felony is committed in the hands of a party accused of the felony is some evidence of his guilt. But this proof may be greatly strengthened or weakened by the character, amount and value of the property; the circumstances, means, occupation, etc., of the defendant. *State v. Millain*, 410.

2. The common law rule that the possession of goods recently stolen shall be held as sufficient evidence to show that the accused is guilty, until he gives some explanation of that possession consistent with his innocence, is not weakened but rather strengthened by our statute allowing the accused to testify in his own behalf. *Id.* 411.

SURETIES.

See CONSTABLE'S BOND.

SUMMONS.

See DEFAULT, 1-2.

TAXATION.

1. Where property is in this State at the time a levy is made thereon for taxes, the owner thereof becomes liable for the tax, although he may have removed the property before the value thereof is assessed. *State v. Easterbrook*, 173.
2. The Constitutional provision, which requires "a uniform and equal rate of assessment and taxation," requires that all *ad valorem* taxes shall be at a uniform rate or per centage. One species of property cannot be taxed at a higher rate than another. *Id.*
3. The products of mines being subjected by Constitutional provision to taxation, in lieu of the body of the mine, the entire annual product must be subject to taxation at the same rate or per centage as other property. *Id.*
4. The first section of the Revenue Law levies a State tax of one dollar and twenty-five cents, and authorizes a County tax not exceeding one dollar and fifty cents on each hundred dollars' worth of all taxable property in the State. This is clearly in accordance with the Constitution. *Id.*
5. Section 99 imposes on the products of the mines an annual *ad valorem* tax of one per cent. for State and County purposes—say one-half per cent. for each. Whether this be held as a substitute for the tax levied in the first section, or as an addition thereto, it is equally void and unconstitutional. Products of the mines can neither be taxed more nor less than other taxable property. *Id.*
6. The Legislature may direct the manner of assessing property, so as to obtain a fair valuation. This Court could only declare such a law unconstitutional where it was manifestly intended to evade the provisions of the Constitution rather than to effect a fair valuation. *Id.*
7. That portion of Section 99 declaring that three-fourths of the value shall be subject to taxation, is manifestly unconstitutional. The value once being ascertained, the whole is liable to taxation. *Id.*
8. Section 117, being merely to carry out the unconstitutional part of Section 99, falls with it, and is void. *Id.*
9. If Section 99 was the only section providing for the taxation of the products of the mines, the whole law would fall with that section; but as Section 1 provides for the taxation of all taxable property, (of course, including products of mines) the law is complete, leaving out Section 99. *Id.*
10. The Tax Collector and other revenue officers should have disregarded the unconstitutional portions of this Act, and proceeded to collect the tax equally from all property under those provisions which are constitutional. Any tax-payer,

by a proper proceeding in Court, could have compelled such a proceeding. One tax-payer cannot be allowed to escape payment of his taxes because the Collector has improperly failed to collect from another from whom taxes are due. *Id.*

TAXATION OF GOVERNMENT LAND.

See ASSESSMENT, 3.

TAX COLLECTOR.

See REVENUE LAW, 1.

TAX DEED.

1. A tax deed which purports to convey the entire fee of United States land, unaccompanied with any proof that any one ever had a possessory claim on the land, could convey nothing, and was therefore properly rejected by the Court below. *Wright v. Cradlebaugh*, 342.
2. One having a Government title may set it up against one claiming under a tax sale made previous to the time when Government parted with its title, notwithstanding any statutory provisions as to the effect of tax sales. *Id.*
3. The Act of the Legislature declaring that "the deed derived from the sale of real property" shall be "conclusive in evidence of title," is of doubtful validity; but even if binding, it cannot be held to mean more than that the recitals of the deed shall be conclusive: not to be contradicted by other evidence. If the deed shows on its face that the assessment was illegal and void, it can convey no title.—Per JOHNSON, J. *Id.*

TITLE TO PERSONALTY.

See MORTGAGE, 1, 2.

TITLE TO LAND.

1. The Court cannot, in an equitable proceeding, try the title to land, nor determine in such a case what should have been the judgment in an action of ejectment formerly pending in regard to the same. *Stonecipher v. Yellow Jacket Silver Mining Co.*, 39.
2. A party being in possession, claiming title, cannot be divested of that possession without a trial at law before a common law Court and a jury. *Id.*

See ASSESSMENT, 6, 8, 9, 10.

TORT.

See PLEADING, 5, 6, 7.

TRIAL AT LAW.

See TITLE TO LAND, 1, 2.

TROVER.

See FIXTURES, 6.

• TRUST.

See PAROL TESTIMONY, 2, 3, 5.

TRUSTEE.

1. ON REHEARING.—When A takes a conveyance for land in the adverse possession of another, with an agreement, in case of recovery, to convey part of the land recovered to B, can he be considered a trustee for B until the recovery is had? *Stonecifer v. Yellow Jacket Silver Mining Co.*, 38.
2. A party taking a conveyance of real estate in trust for a married woman, may mortgage the same to secure the purchase money, the conveyance and mortgage being executed at the same time, and being part of the same transaction; and the fact that the *cestui que trust* at the same time executes her note (which is void because of her coverture) for the purchase money, does not invalidate the mortgage. Nor does her signature to a mortgage to which she is not properly a party, in any way affect its validity. *Mavrick v. Grier et al.*, 52.

VENUE.

1. An application for a change of venue to suit the convenience of witnesses should not be denied because the application was not made until after the answer was filed and the cause set for trial. Nor is it necessary that the answer should make any allusion to the facts on which such application is based. *Sheekles v. Sheekles*, 404.
2. The fact that the case had been set down for trial on a certain day should not interfere with an application for change of venue to suit the convenience of witnesses, unless there had been delay in making the application, or the parties had already prepared for the trial by subpoenaing witnesses, etc. *Id.*
3. The action of the lower Court in granting or refusing a change of venue is a matter of judicial discretion. If that discretion is abused it becomes the duty of an appellate Court to afford relief. *State v. Millain*, 409.
4. Two circumstances should influence a Court to grant a change of venue. One, the impossibility of obtaining a fair and impartial jury; the other, such a state of public excitement against the prisoner as would be likely to overawe and intimidate even a fair jury. *Id.*
5. The fact that threats were made against the prisoner by parties who were not shown to have been either numerous or influential, was not sufficient to show there was danger of the jury being intimidated. *Id.*
6. Where a defendant on his motion for a change of venue showed a state of facts strongly tending to the conclusion that he could not obtain a fair jury, it was not error in the Court to withhold its decision upon the motion until an examination was had of the jurors then in attendance, and being satisfied from such examination that a fair jury could be obtained, to refuse to make the order for change of venue. *Id.*

VERDICT.

1. In all actions for the recovery of money, the jury should always find the amount which the successful party is entitled to recover. A mere finding for the plaintiff, without assessing the sum to be recovered, is not sufficient. As the value of the property at the time of the conversion is not the true measure of damage, a general finding of its value is not a sufficient assessment of the sum of money to be recovered by the successful party in an action for the wrongful conversion of such property. *Knickerbocker Co. v. Hall*, 194.

2. A special verdict must expressly present all the material facts, so that nothing shall remain for the Court but to draw from them the conclusions of law. *Id.*
3. A verdict will not be set aside merely because it is against the weight of evidence. *Bryant v. Carson River Lumbering Co.*, 313.
4. Per LEWIS, J.—The verdict of a jury or findings by a Court will not be set aside on the ground that they are not supported by the evidence, unless it appears by the statement that all the evidence is before this Court. *Howard et al. v. Winters*, 539.

VERIFICATION.

1. Under our Practice Act, is it sufficient ground for allowing an attorney to verify an answer to show that defendant is a foreign corporation? Should it not also be shown that the corporation has no officer in the county where the answer is prepared? *Heintzelman v. L'Amoroux et al.*, 377.
2. Even if the affidavit to an answer is insufficient, is not the objection waived by the opposite party accepting service of the answer, without objection to the sufficiency of the affidavit? Should not the answer in such case be returned with notice that it would not be accepted for want of a proper verification? *Id.*
3. Where there is a defective verification of an answer, the defendant should be allowed to correct the error if he desires to do so. *Id.*

VETO.

See CONSTITUTIONAL LAW, 1, 2, 6.

WATER RIGHT.

See CONVEYANCE.

WAY.

See ROAD, 1.

PRESCRIPTION, 1, 2, 3.

WITNESS.

See GRAND JURY, 2, 3, 4, 5.

PROSECUTOR, 1.

WRIT.

1. A writ issued against and served on a party which does not run in the name of "the State of Nevada," or purport to be by the authority of the "State of Nevada," confers no jurisdiction on the Court over the party named in the writ. But if a party on whom such a defective writ has been served comes into Court, and petitions for time within which to answer such writ, he thereby acknowledges the authority and jurisdiction of the Court, and waives all defects in the form of the writ. *State ex rel. Curtis v. McCullough*, 202.

See MANDAMUS, 1, 2.

WRITTEN INSTRUMENT.

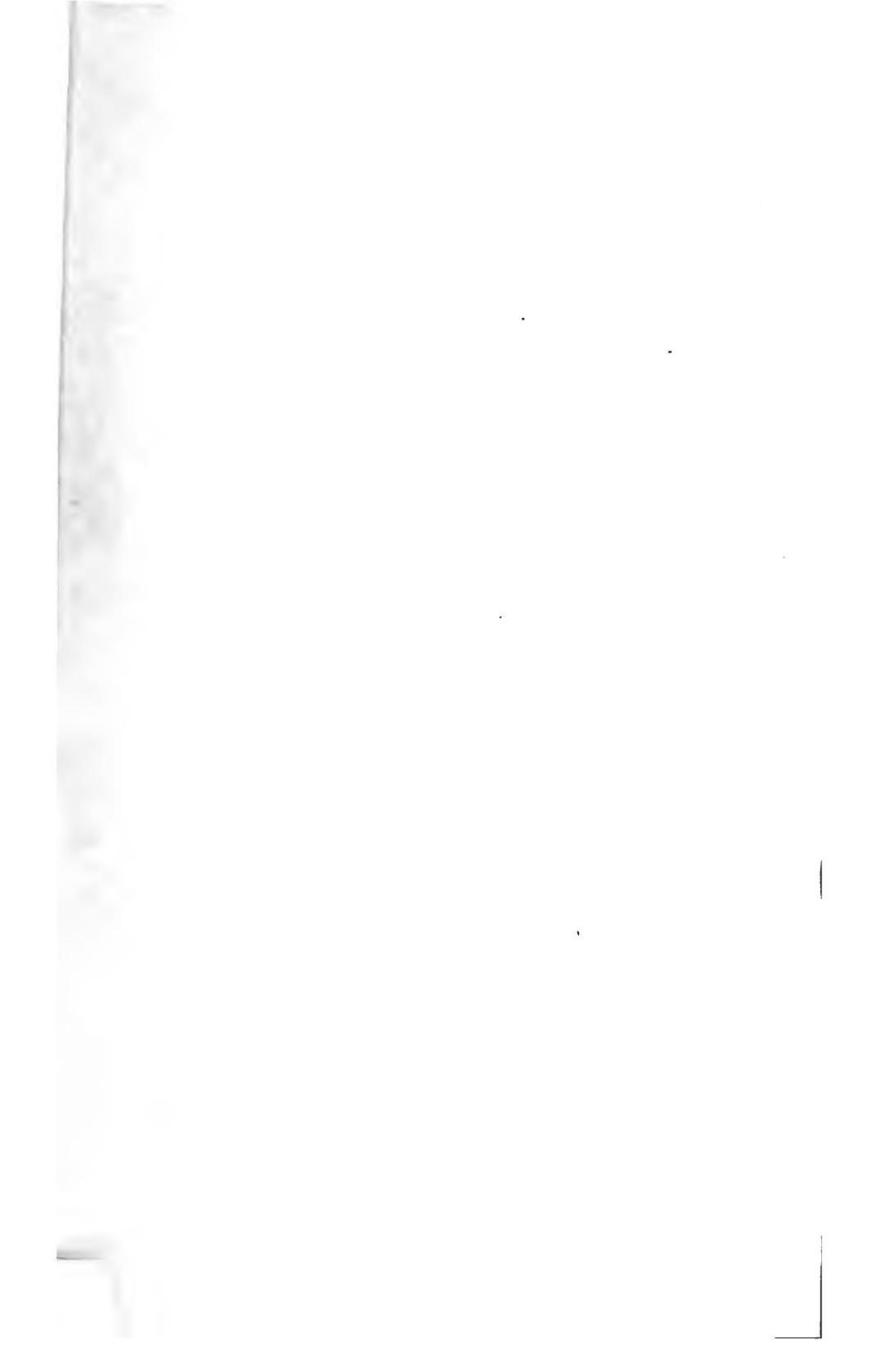
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